84831-9

No. _____

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 38581-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

JZ KNIGHT,
Plaintiff-Respondent,

v.

CITY OF YELM and TTPH 3-8, LLC,
Defendants-Appellants.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Chris Wickham)

RESPONDENT'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Respondent JZ Knight ("Knight") was the petitioner in a Land Use Petition Act, RCW Ch. 36.70C ("LUPA") appeal in Thurston County Superior Court and was the Respondent before the Court of Appeals.

B. COURT OF APPEALS DECISION

An unpublished decision terminating review ("the Decision") was entered on April 13, 2010 (App. A). Reconsideration was denied on June 17, 2010. (App. B)

C. ISSUES PRESENTED FOR REVIEW

1. LUPA Standing

Was it error for the Court of Appeals to reverse the superior court's summary judgment ruling that Knight has standing under LUPA to appeal water availability issues related to the City of Yelm's approval of five preliminary plats where: (1) Knight (a) holds senior water rights, (b) owns and operates a Group A water system near the proposed plats, (c) presented undisputed evidence of "injury in fact," including an expert report showing that the City's erroneous approval would cause direct adverse impacts to Knight, and (d) was the non-moving party; and (2) the Court of Appeals nonetheless found no standing based on facts that arose only after Knight filed her LUPA petition and which resulted from concessions by the City granting Knight the relief sought by her Petition?

This issue warrants review because the Decision conflicts with decisions of the Supreme Court and the Court of Appeals and because whether a citizen can be denied standing under LUPA based on facts that arise after the filing of a LUPA petition is a significant question under Washington land use law of substantial public interest that should be

determined by the this Court. RAP 13.4(b)(1), (2) & (4).

2. Award of Attorney Fees Under the "3 Strikes" Statute

Was it error for the Court of Appeals to award attorney fees to Appellants (City of Yelm and Tahoma Terra ("TT")) under RCW 4.84.370 (which requires that parties prevail in all three prior appeals: the City Council, the superior court, and the Court of Appeals), where (a) Knight prevailed on every issue litigated in superior court, (b) the City and TT appealed every issue decided by the superior court, (c) Knight did not appeal any issue to the Court of Appeals, and (d) the Decision reversed or nullified the superior court's ruling on standing and every other issue, which confirms that Knight, and not the City and TT, prevailed before the superior court and that an award of attorney fees therefore is not allowed?

This issue warrants review because the Decision conflicts with decisions of the Supreme Court and the Court of Appeals and because whether a city or project applicant who does not prevail in superior court can avoid the "3 strikes" rule of RCW 4.84.370 is a significant question under Washington land use law of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2) & (4).

D. STATEMENT OF THE CASE

This is a land use case. The underlying land use issue is an important issue of first impression under Washington law: may a city delay or avoid the water availability requirements of state law for approval of a preliminary plat? For years, the City of Yelm ignored the water availability requirements of state law and City code.[1] CP 685.[2] In May of

[1] RCW 58.17.110 (App. C); Yelm Municipal Code ("YMC") YMC 16.12.170 (App. D).

2007, Knight discovered that the City was not maintaining any records of water connections and since 2001 had been approving new development projects while exceeding its legal water rights. CP 729, 685. In July of 2007, Knight participated in five public hearings for five proposed plats totaling 568 units near Knight's property that would have increased the City's total water connections by at least 25 percent. CP 561, fn.1. Knight presented evidence that the City lacked an adequate water supply to serve these plats. CP 731-41. The City did not present any evidence of water availability as required by state law and City code.

The hearing examiner issued decisions on these five preliminary plats, subject to a disputed condition of approval:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval **and/or** prior to the issuance of any building permit approval. CP 1284 (emphasis added) (App. E.).[3]

Knight appealed the examiner's decision to the Yelm City Council because it failed to require a finding of water availability as required for plat approval by state law and City code. CP 105-09. The City Council denied Knight's appeal on February 12, 2008. CP 25-28. The City Council ruled that Knight lacked standing to appeal the examiner's decision and dismissed Knight's appeal.[4] *Id.*

Knight appealed the City's decision to superior court under the Land Use Petition Act ("LUPA"), RCW Ch. 36.70C. CP 9-24. She alleged facts

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[2] The Administrative Record ("AR") submitted by the City is not page-numbered. Where possible, this brief cites to AR documents contained in the Clerk's Papers ("CP"), referencing the CP page numbers.

[3] The hearing examiner issued a separate decision for each of the five plats. This Petition refers to the decisions on TT's plat application. CP 1260-86.

[4] The City has consistently claimed throughout all levels of judicial review in this case that the City decided Knight's appeal based on Knight's lack of standing and that the City only "contingently decided" the merits of the water availability issue. CP 215, 402.

to show her standing under LUPA and challenged the City's approval of the five plats based on water availability. *Id.* The City and TT twice challenged Knight's LUPA standing in superior court.[5] The superior court rejected both challenges and upheld Knight's standing under LUPA.[6] CP 443-46, 659-60.

Most of the proceedings in superior court focused on the issue of Knight's standing under LUPA.[7] The only land use issue litigated before the superior court was whether it was lawful for the City of Yelm to approve the plats based on the disputed "and/or" condition of approval.[8] Knight and the Department of Ecology ("Ecology") relied on record evidence that the City lacked an adequate water supply for these five plats. CP 685, 731-41, 1498. Knight showed that the City was continuing to approve plats and other new development projects without any written findings of water availability. CP 1499-1507 (App. F.)

The City responded that RCW 19.27.097 (App. G.), in the State Building Code, requires evidence of water rights to prove adequate water supply but state subdivision law does not. VRP (10/01/08) at 41-43. The City claimed that evidence of water rights is not needed for plats and that plats can be approved if the City merely states, without evidence of water

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[5] CP 215-20, 221-37 (motions to dismiss); CP 540-57, 558-59 (summary judgment motions).

[6] In the superior court, the City argued that the "aggrieved person" standing requirement for administrative appeals to the City Council is identical to the standing requirement for judicial review under LUPA. CP 72. Therefore, when the superior court ruled that Knight had LUPA standing, it reversed the City Council's "final decision" dismissing Knight's appeal based on standing as an "aggrieved person" under City code.

[7] Superior Court pleadings on standing: CP 29,41-43, 44-56, 57-67, 68-121, 122-24, 125-36, 137-89, 190-200, 215-20, 221-37, 238-39, 240-54, 255-61, 366-84, 401-10, 411-12, 413-40, 540-57, 558-59, 560-84, 585-99, 600-10, 611-42, 643-58, 659-60.

[8] Briefing on the merits of the water availability issues: CP 661-763, 829-1088, 1198-1238, 1516-34.

rights, that it has "a reasonable expectancy" that water would be available when needed. CP 1203-04. [9]

Near the end of the LUPA appeal in superior court, the City changed its argument and promised it would apply the disputed condition not as written, but as required by state and local law – i.e., require proof of water availability at the time of final subdivision approval and also at the time of building permit approvals. VRP (10/01/08) at 31-32. CP 1207, lines 3-9. Thus, the City conceded that Knight's position was correct: the water availability condition of approval ("provide a potable water supply adequate to serve the development") must be met at both the time of final plat approval and also at the time of later building permit approval.

Consistent with the City's change in position and TT's apparent agreement[10] to interpret and apply the "and/or" condition language as urged by Knight and as required by state law and City code ("and" without the "or"), the superior court issued a letter decision and invited the parties to present a final judgment to resolve Knight's appeal of these five plats. CP 1561-65 (App. H.).

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[9] The City and TT have accused Knight of trying to require that the City have Ecology-approved water rights in hand prior to City approval of preliminary plats. CP 1212. The accusation is without merit. Knight's position has been clearly stated since her first filing with the hearing examiner:

> We request that the Hearing Examiner require the City of Yelm and the applicant to establish that appropriate provisions have been made for potable water supplies to serve the proposed development, that the proposed development complies with the water availability requirements of the Comprehensive Plan and the Water System Plan, and that the proposed water supply will be adequate and available to serve the subdivision concurrently with the development.
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> AR (Moxon Letter to Hearing Examiner 7-23-07. (emphases added).

[10] TT's superior court LUPA brief continued to argue that water availability could be deferred until building permit issuance. CP 829, 846, 849. However, when the City agreed to change the "and/or" condition to "and," TT did not object. VRP (10/01/08) at pages 32 (lines 11-12), CP 1562, 1641.

Despite the City's earlier promise to accept the modification of the "and/or" condition, both the City and TT objected to the court's entry of a proposed judgment to modify the disputed condition of approval. VRP (11/07/08) at pp. 17-20 (App. I.) They also both objected to the superior court's granting Knight's request to receive notice of future final plat approvals for these five plats. *Id.* at 10-12, 27. They further objected to the entry of findings of fact and conclusions of law explaining the superior court's ruling. *Id.* at pp. 23-27 (App. I). The superior court overruled these objections and entered findings and conclusions and a final judgment, which reversed the City's approval of the five plats with the "and/or" condition and remanded the plats to the City with a revised condition to meet water availability requirements of state law and City code (changing "and/or" to "and also"). CP 1636-45 (App. J., App. K.). This prohibited the City from delaying proof of water availability for these five plats until the time of building permit/water connection approvals for the individual lots within these five plats.

The City and TT appealed all of the superior court's rulings: (1) the summary judgment ruling on standing, (2) the reversal of the City's "and/or" condition of approval, (3) the requirement to provide written notice to Knight regarding future final plat approvals for these five plats, and (4) the entry of findings and conclusions. CP 1646, 1663. Their appeals confirmed that they had not prevailed and were seeking a reversal of all of the superior court's rulings. The Court of Appeals reversed the superior court's ruling on standing and did not reach the substantive water availability issue or any other ruling of the superior court. Decision at 1. Although the City and TT had appealed to reverse all of the superior court

rulings on which Knight had prevailed, the Court of Appeals awarded attorney fees to the City and TT as prevailing parties on appeal who had also "substantially prevailed" in superior court. *Id.* at 4.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

1. Overview

This Petition presents two issues for review: (1) a citizen's standing to challenge a city's failure to comply with the water availability requirements of RCW 58.17.110; and (2) the "3 strikes" rule of RCW 4.84.370, which does not allow a fee award against a party who prevails in superior court and does not appeal to the Court of Appeals.

The Decision erroneously dismissed Knight's LUPA appeal for lack of standing based on facts that did not exist until after Knight had filed her LUPA appeal and after she had won concessions in superior court. It also failed to construe facts relevant to Knight's standing in the light most favorable to her as the non-moving party on summary judgment.

Moreover, the City and TT were not entitled to attorney fees under RCW 4.84.370 because they did not prevail on standing or any other issue litigated in superior court.

2. Water Availability is Mandatory for Preliminary Plat Approvals

State law and Yelm code require public notice and a public hearing prior to approval of a preliminary plat. RCW 58.17.090 (App. C.); YMC 16.12.150 (App. D.). A city may not approve a preliminary plat unless it makes a written finding that "appropriate provisions are made for ... potable water supplies." RCW 58.17.110(2) (App. C.); YMC 16.12.170 (App. D.). The City provided public notice and held public hearings on these five plats, but the City and the plat applicants presented no evidence

of water availability at the public hearings. The City offered no finding of water availability. Knight presented evidence from Ecology at the public hearings, which raised significant questions about the City's ability to provide potable water to these plats. CP 731-41. That evidence confirmed that the City had overstated its current water rights and confirmed Knight's position that the City could not show water availability for the five plats. *Id.*

The hearing examiner concluded that the City could approve these five preliminary plats without proving water availability so long as the preliminary plat approvals were conditioned "to provide both domestic water and fire flow prior to final plat approval." CP 1274-81 (App. E). However, the hearing examiner failed to include such a condition of approval. CP 1274-81. Knight filed a motion for reconsideration to correct this error. CP 97-103. The hearing examiner then added a condition to allow the provision of a potable water supply for these five plats to be deferred until "final plat approval **and/or** prior to the issuance of any building permit." CP 1284 (emphasis added).[11]

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[11] The City and TT claim the disputed condition of approval must be interpreted in light of one of the hearing examiner's findings ("State law and Yelm Municipal Code require potable water supplies at final plat approval **and** building permit approval"). CP 1283 (emphasis added). However, another hearing examiner finding is in direct conflict:

> "[t]he documents submitted by the City provide a 'reasonable expectation' that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits **or** for final binding site plan [plat] approval." CP 1270 (emphasis added).

Even if these findings did not create ambiguity or conflict, it is the conditions of approval that are the controlling requirements for the final approval of these plats. *See e.g. HJS Development v. Pierce County*, 148 Wn.2d 451, 485-86, 61 P.3d 1141 (2003). Moreover, the City's actions after denying Knight's appeal confirm that the City did not intend to require provision of a water supply prior to final plat approval as required by state law, but intended to defer provision of a water supply until much later, at the time of building permit approvals. CP 1499-1507 (App. F).

This disputed condition is at the heart of Knight's LUPA appeal. The condition fails to comply with state subdivision law and City code requiring a written finding of water availability prior to preliminary plat approval. RCW 58.17.110(2) (App. C); YMC 16.12.170 (App. D). There is no legal authority for deferring this determination until the time of building permit approvals. Moreover, the timing of water availability for a plat is an important public policy issue. The Legislature has determined that real property in platted developments cannot be sold unless the plat complies with all subdivision requirements, including provision of a potable water supply. RCW 58.17.200. If a City is allowed to defer water availability until the building permit stage, developers will be able to plat and sell lots to individuals who will assume that the lots are served by potable water only to find out later, when the developer is gone, that a building permit cannot be issued due to an inadequate potable water supply (or the city will provide water and exceed its water rights, as Yelm has been doing for years).[12] The disputed "and/or" condition of approval creates such a risk.

3. The Court of Appeals Erred by Disregarding Undisputed Evidence of Knight's Standing and by Relying on Concessions That Knight Won as a Result of Filing the LUPA Appeal to Hold That She Lacked Standing to Appeal.

a. Knight presented undisputed evidence showing standing.

Knight agrees with the standards for judicial review of a land use

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[12] YMC 16.12. 330 creates a binding commitment that water will be provided to each lot within an approved final plat: "A final plat shall vest the lots within such plat with a right to hook up to sewer and water for a period of five years after the date of recording of the final plat." App. D (emphasis added). Yelm's failure to confirm water availability at the time of final plat approval disregards the risk of future conflicts with individual lot owners.

decision under LUPA as set forth in the Decision. However, the Court of Appeals failed to apply the correct standard for review of the superior court's summary judgment ruling on Knight's standing. Knight was the nonmoving party, but the Court of Appeals failed to "view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." Decision at p. 9, citing *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

Knight has standing under LUPA because she is a "person aggrieved or adversely affected by the land use decision."[13] The City's approval of the five plats with the unlawful "and/or" condition of approval "has prejudiced or is likely to prejudice" Knight. RCW 36.70C.060(2)(a). Knight provided evidence that she owns nearby property that would be harmed by the City's decision to approve these plats without proof of adequate water. CP 600-04. (App. L). Her property interests include significant water rights approved by the Department of Ecology. *Id.* Knight has a surface water right from Thompson Creek and a Group A public water system operating under a groundwater certificate. *Id.*, CP 606-10. The City's wells are near Knight's property and draw from the same aquifer that supplies Knight's domestic water system. CP 589-95. This aquifer is in hydraulic continuity with Thompson Creek, so that any increase in groundwater withdrawal by the City will directly and adversely

[13] "A person is 'aggrieved or adversely affected' and has standing under LUPA when the following conditions are present: (a) The land use decision has prejudiced or is likely to prejudice that person; (b) That person's asserted interests are among those the local jurisdiction was required to consider when it made the land use decision; (c) A judgment in that person's favor would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and (d) The petitioner has exhausted his or her administrative remedies to the extent required by law." RCW 36.70C.060(2). Subsections (b) and (d) are not at issue in this case.

impact Knight's ability to utilize her water rights. CP 593-94. Knight's water rights are constitutionally protected property interests. *Dept. of Ecology v. Acquavella*, 100 Wn.2d 651, 655-56, 674 P.2d 160 (1983). They cannot be impaired either by junior water rights or by changes to other senior or junior water rights. *See* RCW 90.03.010 & RCW 90.03.380.

Knight submitted evidence of "injury in fact" showing that the City of Yelm had been exceeding its Ecology-approved water rights since 2001, CP 685, that the City's use of water in excess of its water rights directly prejudiced Knight's senior water rights,[14] and that the "and/or" condition of approval failed to prevent such prejudice in the future by avoiding the state subdivision law requirement to determine water availability prior to plat approval. CP 600-04. Knight also submitted an undisputed declaration and expert report from a hydrogeologist consultant demonstrating that the City's withdrawal of water for these five plats is expected have a direct adverse impact on Knight's water rights. CP 585-99. (App. M).

The Court of Appeals ignored this evidence of Knight's injury, failed to consider this evidence in the light most favorable to Knight as the nonmoving party in the superior court's summary judgment ruling on standing, and concluded, without explanation, that Knight had not demonstrated she would be "specifically and perceptibly harmed" by the plat approvals. Decision at 12. The Court of Appeals also concluded,

[14] The prejudice to Knight's senior water rights results from City use of unauthorized water (in excess of the City's legal water rights), which avoids Ecology's water rights approval process. CP 603-04. Ecology's review and approval of new water rights includes mitigation requirements to address impacts that new water rights would have on holders of senior water rights such as Knight. *Id.*

again without explanation, that Knight failed to show that a judgment in her favor would substantially eliminate or redress the alleged prejudice. *Id.*

The Decision thus conflicts with well-established case law on LUPA standing. For example, this Court has recognized that Washington case law on standing has established certain principles, including that "[in] general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Chelan County v. Nykreim*, 146 Wn.2d 904, 934-35, 52 P.3d 1 (2002), quoting *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App. 816, 829-30, 965 P.2d 636 (1998). In *Suquamish Indian Tribe*, Division I applied this principle to find standing where the petitioners lived near the proposed project and asserted that increased traffic on roads they used would harm them. 92 Wn.App at 831; *see also Anderson*, 86 Wn.App. 290, 300, 936 P.2d 432 (1997) (Division II case holding that organization member had standing based on testimony that he owned property adjacent to project site and that stormwater runoff would damage his property).

b. The Court of Appeals erroneously based its ruling that Knight lacked standing on facts that arose only after she appealed and won agreement on the very relief sought by her LUPA petition.

In addition to erroneously disregarding factual evidence of Knight's standing, the Court of Appeals made an even more fundamental error in its standing analysis. Instead of determining Knight's standing based on facts that existed at the time she appealed the plat approvals to the City Council, the Court of Appeals decided the issue of Knight's standing based on changed factual circumstances that came into existence only after Knight had filed her LUPA appeal in the superior court and only after Knight had succeeded in forcing the City to concede the central disputed issue in this

appeal: the "and/or" condition. The Decision states:

> [T]he record demonstrates that all parties understood and agreed that this ["and/or"] condition required this showing [water availability] at both final plat approval and building permit approval."
> Decision at 12 (emphasis in original).

However, the relevant record for Knight's standing is the record at the time Knight filed her appeal to the City Council. The Decision further states: "No one disputes this ['and/or' condition] on appeal." *Id.* This is irrelevant to Knight's standing because the City did not agree to concede the "and/or" issue until after Knight had filed her LUPA appeal, after Knight had prevailed against the City's motion to dismiss and motion for summary judgment on the standing issue, and after Ecology filed an amicus brief in support of Knight's appeal (over the vigorous objections from the City and TT).[15] CP 265-85, 287-350, 385-96, 1535-46.

Ironically, if not overturned by this Court, the Court of Appeal's reversal of the superior court's ruling on standing will result in remanding these five plats to the City with the original "and/or" language restored, which would nullify the very basis on which the Court of Appeals denied Knight's standing. Such a result would free the City to revert to its former unlawful practice of requiring water availability only at the time of building permit approval, not at the time of final plat approvals.[16]

The Decision creates an improper test for LUPA standing that ignores

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[15] Ecology's amicus brief confirmed that the City's historical use of water exceeded its water rights and that the City does not have sufficient water rights to serve the five proposed subdivisions. CP 1482-98.

[16] For example, in its briefing to the City Council, City staff insisted that water availability could be determined at final plat "or" building permit issuance. AR (Community Development Department Memo to Council, 1/7/08 p. 4). Knight presented additional evidence that after Knight's appeal was denied by the City Council, the City continued to allow plats and other developments to defer water availability until the time of building permit approvals. CP 1499-1507 (App. F).

the relevant factual record (at the time of the initial appeal of the land use decision) and defeats a LUPA petitioner's standing based on any success the petitioner achieves after the initial appeal of the land use decision. This result is contrary to all of the well-established Washington case law on LUPA standing. No Washington Court has ever denied standing to a citizen based on litigation or settlement successes achieved by the citizen after the initial appeal is underway. Washington courts have always considered facts relevant to a LUPA petitioner's standing at the time a land use decision is appealed, not changed facts that may arise after a LUPA appeal has been filed.[17]

Because the Decision erroneously relied on the parties' superior court agreement regarding the "and/or" condition, it assumed the City would not approve final plats and would not issue building permits until water is available, in which case "then Knight will suffer no injury." Decision at 12. However, this assumption rests entirely on an agreement that did not exist at the time Knight first appealed the land use decision, which was achieved only because of that appeal, and which has now been undone by the Court of Appeal's reversal of the Superior Court ruling.

After concluding that the parties' superior court agreement on the "and/or" condition defeated Knight's standing, the Court of Appeals addressed "Knight's contention that, absent the superior court's judgment, she will not receive notice of any final plat or building permit approvals

[17] Under the Decision's standing test, the possibilities abound for mischief in LUPA cases. For example, a city or developer who "sees the handwriting on the wall" in a LUPA appeal in superior court could reach agreement on mitigation with the LUPA petitioner, allow the mitigation to be included in a superior court judgment, and then appeal seeking dismissal based on lack of standing, which would, as here, nullify the mitigation agreed to in superior court.

and will thus be unable to obtain judicial review of these decisions." Decision at 13. This is a separate and independent ground for Knight's LUPA standing in an appeal challenging the City's deferral of water availability for preliminary plats. The Decision states, without explanation, that such notice-related injuries "are simply too remote to confer standing." *Id.* However, there is no evidence in the record to show that Knight would receive any public notice of the water availability determinations for final plat or building permit approvals for these plats.[18]

The superior court understood the prejudice to Knight arising from the City's deferral of water availability determinations from preliminary plat approval (which requires public notice and a public hearing) to final plat or building permit approval (neither of which are subject to any public notice or public hearing). VRP (11/07/08) at 12/13 (App. I). CP 1639-42. The superior court exercised its authority under LUPA[19] to protect Knight's interests in monitoring the City's future approvals of these five plats to ensure that the City will do what it promised in superior court, but which it has not done in the past – require a written water availability finding prior to approval of plats. CP 1499-1507 (App. F__). The superior court's order requiring notice was essential to ensuring that Knight would be able to review the City's evidence of water availability at the time of final plat approvals for these five plats to protect her senior water rights. The Decision on standing terminated this protection of Knight's interests.

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[18] State law and Yelm code do not require public notice or public hearings for final plat or building permit approvals. App. C; App. D.

[19] RCW 36.70C.140 provides: "The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction."

Without notice, Knight's right to obtain judicial review of subsequent plat approvals by the City will be significantly impaired. Without judicial review, Knight will be without recourse to challenge final plat approvals lacking proof of water availability. The results described as "a series of future events that may not ultimately occur," Decision at 13, are in fact all too likely to occur. The City has failed to require water availability for plats in the past, the City has exceeded its water rights since 2001, and the Decision, if not reversed, will restore the disputed "and/or" condition of approval, which will allow the City to resume its practice of postponing water availability determinations until the time of building permit approvals and will deny Knight notice of water availability determinations that the Legislature has determined must be made at the time of preliminary plat approvals and must be subject to public notice. RCW 58.17.090.

4. The Court of Appeals Erred By Awarding Attorney Fees Under RCW 4.84.370 Against Knight, Who Did Not Appeal to the Court of Appeals, and In Favor of Appellants Who Did Not Prevail in Superior Court

This Court should review and reverse the Decision's award of attorney fees, which is erroneous for three independent reasons: (1) RCW 4.84.370 authorizes an award of fees only against a party who appealed to the court awarding fees, and Knight did not appeal to the Court of Appeals; (2) RCW 4.84.370 does not allow an award of attorney fees against a party such as Knight who prevailed in the superior court on standing and on all other issues; and (3) RCW 4.84.370 should apply only where the land use decision is upheld on the merits.

a. RCW 4.84.370 only applies to parties who appeal beyond superior court.

The Legislature enacted RCW 4.84.370 to discourage meritless appeals. *Gig Harbor Marina v. City of Gig Harbor*, 94 Wn.App. 789, 798, 973 P.2d 1081, *rev. denied* 138 Wash.2d 1016 (1999), *cert. denied*, 528 U.S. 1155 (2000). This Court has made clear that only a party who appeals a land use decision beyond superior court is at risk of having to pay attorney fees under RCW 4.84.370:

> The possibility of attorney fees does not arise until a land use decision has been appealed at least twice: before the superior court and before the Court of Appeals and/or the Supreme Court. RCW 4.84.370 (1). Thus, parties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs if they are unsuccessful before the superior court.
>
> *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005) (emphasis added), citing *Baker v. Trimountain Res., Inc.*, 94 Wn.App 849, 854, 973 P.2d 1078 (1999).

In *Habitat Watch*, this Court twice expressly stated that a party is only potentially liable for attorney fees if it appeals to the Court of Appeals (or beyond):

> First, an opponent who does not prevail before the local jurisdiction "might be subject to attorney fees if it appeals the decision to the Court of Appeals and is unsuccessful at each level." *Id.* at 415 (emphasis added).
>
> Conversely, where an opponent does prevail before the local government, it "would be eligible for attorney fees from the landowner if the landowner continually appealed the land use decision to the Court of Appeals or higher and was unsuccessful at each level of judicial review." *Id.* at 416 (emphasis added).

Division II has recognized this limitation on awarding attorney fees under this statute:

> Here, the Legislature has determined that to discourage meritless appeals, a party appealing a land use decision ***beyond*** the superior court risks paying an opponent's fees. ... [RCW 4.84.370] only

imposes fees on an appellant who is unsuccessful for the third time.

Gig Harbor Marina, 94 Wn.App. at 800-01 (emphases added).

Consistent with *Habitat Watch* and *Gig Harbor Marina*, no decision by this Court or the Court of Appeals (except for the Decision) has ever required a party who was not an appellant or petitioner in the court issuing the decision to pay fees under RCW 4.84.370.[20] Requiring Knight, who did not appeal to the Court of Appeals, to pay attorney fees to the parties who did appeal, completely undermines the legislative intent to discourage unnecessary appeals, and directly conflicts with this Court's statement in *Habitat Watch* that only parties who appeal to the Court of Appeals or beyond are liable for fees under RCW 4.84.370.

b. Knight was the prevailing party in superior court.

The Decision erroneously concluded that the City and TT "substantially prevailed" in superior court simply because the Court "ultimately upheld the City's decisions to grant the preliminary subdivision approvals." Decision at 14. This overlooks the very important differences between the City's land use decision and the superior court's decision, as evidenced by the fact that the City and TT were compelled to appeal.[21] Given those substantial differences, it cannot

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[20] A Westlaw search on July 16, 2010, located 116 published and unpublished decisions, including the Decision, which cite RCW 4.84.370. In every case where fees were awarded--except for the Decision--the party liable for paying its opponent's fees was an appellant, cross-appellant or petitioner in the court that imposed the fees, never solely a respondent.

[21] The City Council ruled that Knight lacked standing while the superior court found she had standing. The City Council upheld the Examiner's "and/or" wording while the superior court reversed and remanded to correct that wording. The superior court imposed additional notice requirements on the City as a condition of final plat approvals and entered conclusions regarding the showing of water availability required for final plat approval, to which the City and TT strenuously objected. The fact that the superior court completely reversed the City on standing -- the only portion of the City decision that the Decision reviewed -- is sufficient on its own to preclude any conclusion that the City and TT prevailed in superior court.

be said that the City and TT, which supported the City's decisions, substantially prevailed in superior court.

Courts applying RCW 4.84.370 have consistently recognized that it is the issue on appeal that determines who is the prevailing party. When the issue on appeal is a condition of approval, the "prevailing party" is not determined by whether the approval itself is upheld, but by the outcome of the disputed condition of approval. *See Pavlina v. City of Vancouver*, 122 Wn.App. 520, 94 P.3d 366 (2004) (awarding fees to a city for successful defense of developer's appeal of impact fee condition imposed on its preliminary plat approval); *see also Benchmark v. City of Battle Ground*, 94 Wn.App. 537, 972 P.2d 944 (1999), 103 Wn.App. 721, 14 P.3d 172 (2000), *aff'd on other grounds*, 146 Wn.2d 685, 49 P.3d 860 (2002)(developer who prevailed in superior court and the Court of Appeals in a challenge to a preliminary plat condition was not the prevailing party at the city level based on the fact that the city approved the preliminary plat)

The only issue considered at all three levels of appeal in this case was the issue of Knight's standing. Under RCW 4.84.370 and the decisions in *Pavlina* and *Benchmark*, the determination of whether the City and TT prevailed at all three levels must be based, at a minimum, on whether they prevailed on the standing issue at all three levels, which of course they did not, having lost in superior court.[22]

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[22] Indeed, by appealing to the Court of Appeals, which expressly decided to "reverse the trial court" (Decision at 1), the City succeeded in eliminating the notice conditions and conclusions of law that the superior court entered in favor of Knight. The very fact that the City and TT appealed and the Court of Appeals reversed the superior court demonstrates that they did not prevail in superior court when that court's decision is considered in its entirety and in the context of the decisions below and above the superior court level.

c. Conflict Between Divisions

Decisions from the divisions of the Court of Appeals are in conflict as to whether RCW 4.84.370 allows an award of attorney fees to a party who prevails on procedural grounds. Division II has refused to award attorney fees in such circumstances. *See Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn.App. 593, 601, 972 P.2d 470 (1999); *Witt v. Port of Olympia,* 126 Wn.App. 752, 758-60, 109 P.3d 489 (2005). Division I has held that RCW 4.84.370 does not require a party to prevail on the merits. *Prekeges v. King County,* 98 Wn.App. 275, 285, 990 P.2d 405 (1999); *West Coast, Inc. v. Snohomish County*, 104 Wn.App. 735, 16 P.3d 30 (2000). In *Nickum v. City of Bainbridge Island,* 153 Wn. App. 366, 383, 223 P.3d 1172 (2009), Division II awarded attorney fees in an appeal decided on jurisdictional grounds, but did not address the prior holdings in *Overhulse* and *Witt.* Thus, the conflict in the Court of Appeals on this issue has not been resolved.

F. CONCLUSION

For the reasons set forth above, Knight respectfully requests that this Court review and reverse the Decision and reinstate the judgment of the superior court.

RESPECTFULLY SUBMITTED this _____ day of July, 2010.

GORDONDERR LLP

By: _____
Keith E. Moxon,
WSBA No. 15361
Attorney for Respondent

CARNEY BADLEY SPELLMAN P.S.

By: _____
Michael B. King
WSBA No. 14405
Attorney for Respondent

considered in its entirety and in the context of the decisions below and above the superior court level.

CERTIFICATE OF SERVICE

On this 19th day of July, 2010, I caused to be delivered in the manner indicated below a true and correct copy of (1) Respondent JZ Knight's Petition for Review; and (2) Certificate of Service to the following:

Court of Appeals, Division II
c/o Court of Appeals, Division I
600 University Street
Seattle, WA 98101-1176

[ ] By United States Mail
[x] By Messenger
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on July 19th, 2010.

Amanda Kleiss-Acres, Declarant

LIST OF APPENDICES

A. Decision dated 04/13/2010

B. Order on Reconsideration dated 06/17/2010

C. RCW Chapter 58.17 (excerpts with bold emphases added)

D. Yelm Municipal Code (excerpts with bold emphases added)

E. Hearing Examiner's decision on Tahoma Terra plat (excerpts with highlighting added)

F. Declaration of Keith Moxon dated 09/26/2008 with Exhibit A attachments

G. RCW 19.27.097 (with bold emphases added)

H. Superior Court Letter Decision dated 10/07/2008

I. VRP excerpt (pages 12-13, 17-27) from 11/07/2008 hearing on presentation of judgment (markings on original as filed in Court of Appeals by Tahoma Terra on 04/09/2009)

J. Superior Court Amended Findings and Conclusions dated 11/07/2008

K. Superior Court Judgment dated 11/07/2008

L. Declaration of JZ Knight dated 07/03/2008 (with attachments)

M. Declaration of Erik Miller dated 07/03/2008 (with expert report Exhibit A - including color copy of CP 596 as submitted to the superior court)

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JZ KNIGHT,

Respondent,

v.

CITY OF YELM; WINDSHADOW, LLC; ELAINE C. HARSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS, LLC; TTPH 3-8, LLC;

Appellants.

No. 38581-3-II

UNPUBLISHED OPINION

PENOYAR, A.C.J. — TTPH 3-8 (Tahoma Terra) and the City of Yelm appeal, arguing that the trial court erred by denying their motion to dismiss JZ Knight's Land Use Petition Act (LUPA)[1] petition and their subsequent motion for summary judgment. They argue that Knight failed to (1) establish standing under both the Yelm Municipal Code (YMC) and LUPA and (2) assign error to the Yelm City Council's determination that she lacked standing under the YMC to appeal the hearing examiner's decisions granting preliminary subdivision approvals. They also argue that the trial court erred by remanding the examiner's "condition," by entering findings of fact and conclusions of law, and by imposing additional notice requirements on the City. Both parties argue that they are entitled to attorney fees and costs. We affirm the challenged preliminary subdivision approvals, reverse the trial court, dismiss Knight's LUPA petition for lack of standing, and award attorney fees and costs to the City and Tahoma Terra.

[1] Chapter 36.70C RCW.

FACTS

I. HEARING EXAMINER

In 2007, five separate applicants applied for preliminary subdivision approvals with the City.[2] One of the applicants, Tahoma Terra, sought to subdivide approximately 32.2 acres into 198 single-family residential lots.

On July 23, 2007, the hearing examiner held public hearings on the five subdivision applications. Knight, who owns property near the proposed subdivisions,[3] opposed all of the subdivision applications. She argued that the applicants and the City failed to establish that: (1) appropriate provisions had been made for potable water supplies to serve the subdivisions; (2) the subdivisions complied with the water availability requirements of the Comprehensive Plan and the Water System Plan; and (3) the proposed water supply was adequate and available to serve the subdivisions concurrently with development.

On October 9, after considering the parties' post-hearing submissions, the examiner conditionally granted preliminary subdivision approvals in five decisions. In his decisions, the examiner determined:

---

[2] Three of the applicants, including Tahoma Terra, sought preliminary plat approval under chapter 16.12 YMC. The other two sought binding site plan approval under chapter 16.32 YMC. The five proposed subdivisions would add a total of 568 new residential units to the City's existing 2,135 residential units. The water availability requirements under both processes are identical. YMC 16.12.170, YMC 16.32.065. Tahoma Terra is the only applicant who now appeals.

[3] Knight's property is located approximately 1,300 feet from the closest of the proposed subdivisions. She owns a surface water right from Thompson Creek, which traverses her property. Knight also operates a domestic water system that is authorized to use groundwater for potable water requirements under a water right certificate. The aquifer from which Knight draws water is also the supply source for the City's wells. Additionally, Thompson Creek is in hydraulic continuity with the City's wells.

> At preliminary binding site plan [or preliminary plat] approval, an applicant must show a reasonable expectancy that the water purveyor (in this case the City) will have adequate water to serve the development upon final [plat] approval.
>
> . . . .
>
> The applicant's parcel is located in an area approved for municipal water service, and the documents submitted by the City provide a "reasonable expectation" that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits or for final building site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology [DOE] and Department of Health will grant the City additional water rights in the future. Such amounts to speculation until the City has made a specific application and agencies have made a specific decision. The Examiner finds most persuasive the letter from Skillings Connelly dated August 9, 2007, entitled "City of Yelm Projected Water Demand," which shows that upon transfer of the golf course and McMonigle water rights and by securing a new water right in 2012, the total cumulative water rights available to the City will far exceed the cumulative water demand.
>
> . . . .
>
> Courts and the legislature have not required applicants to show water availability at the time of preliminary plat/binding site plan approval, but only that the City or other purveyor has a reasonable plan to provide such service. In the present case, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights.

Clerk's Papers (CP) at 1268, 1270, 1275; Administrative Record (AR) (Oct. 7, 2007) Office of the Hearing Examiner City of Yelm Report and Decision, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PDR-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

Knight subsequently moved for reconsideration of the examiner's decisions, requesting that he add a requirement that provisions for water be made prior to final subdivision approval. The examiner denied Knight's motion on December 7, 2007.

The examiner, however, added three findings and a new condition to his previous decisions. He found the following:

> 1. The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes the water rights from the Dragt farm have been

> conveyed to the City and approved by [DOE]. Evidence also shows the conveyance of water rights from the Nisqually Golf and Country Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If DOE does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.
>
> 2. While State law and the [YMC] require potable water supplies *at final plat approval and building permit approval*, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by [Knight's counsel] in his response are beyond the Examiner's authority and interfere with the City's ability to manage [its] public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

CP at 1283 (emphasis added); AR (Dec. 7, 2007) Office of the Hearing Examiner City of Yelm Decision on Reconsideration, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PRD-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

The examiner then added the following condition to each of the preliminary subdivision approvals:

> The applicant must provide a potable water supply adequate to serve the development *at final plat approval and/or prior to the issuance of any building permit* except as model homes as set forth in Section 16.04.150 YMC.

CP at 1284 (emphasis added).; AR (Dec. 7, 2007) Office of the Hearing Examiner City of Yelm Decision on Reconsideration, Case Nos. BSP-07-0094-YL, BSP-07-0097 and PRD-07-0098-YL, SUB 05-0755-YL and PRD-05-0756-YL, SUB 07-0128-YL and PRD-07-0129-YL.

II. CITY COUNCIL

Knight subsequently appealed the examiner's preliminary subdivision approvals to the City Council, which denied her consolidated appeals based on lack of standing:

> JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, *Knight is not an aggrieved person with standing to appeal the Examiner's decision to the City Council.* Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council *contingently decides* Knight's appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.

CP at 26 (emphasis added). On February 12, 2008, the City Council passed Resolution No. 481, affirming the examiner's individual findings and conclusions.

III. SUPERIOR COURT

Knight next filed a LUPA petition in Thurston County Superior Court, again challenging the City's preliminary subdivision approvals. In her petition, however, Knight did not specifically assign error to the City Council's decision that she lacked standing to appeal the examiner's decisions or that she was not an "aggrieved person" under the YMC.[4]

In April 2008, Tahoma Terra and the City joined two other respondents in their motion to dismiss Knight's petition on the grounds that she had failed to appeal the City Council's dispositive decision that she lacked standing and that she also lacked standing under the YMC and LUPA. The trial court denied their motion without prejudice. The respondents then moved for summary judgment, again arguing that Knight lacked standing to (1) appeal the examiner's decision to the City Council under the YMC, and (2) seek judicial review of the City's decisions

[4] Knight argues, however, that she challenged the entire City Council decision and that her petition contained "detailed allegations" demonstrating that she had standing. Resp't's Br. at 13.

under LUPA. The trial court again denied their motion. The parties then submitted briefing on the merits.

Knight made two assertions: (1) that a finding that appropriate provisions have been made for potable water at the preliminary plat approval stage requires the City to condition preliminary approval on a determination of water availability at the final plat approval stage rather than the building permit stage and (2) that a determination of water availability at the final plat approval stage must be based on available and DOE-approved water rights currently held by the water purveyor (in this case, the City) sufficient to serve all demand, including all approved but not yet constructed developments and pending development applications. Tahoma Terra and the City did not dispute Knight's first argument, and they asserted that the examiner's decision reflected this legal interpretation.[5] As for Knight's second assertion, Tahoma Terra argued that it had no basis in the law and that the record demonstrated that it had already made appropriate and adequate provisions of potable water for its proposed subdivision.

On October 1, 2008, the trial court held a hearing on Knight's petition. Six days later, it issued a letter opinion in Knight's favor, granting her petition. It subsequently adopted her proposed judgment, findings of fact, and conclusions of law, to which the City and other respondents objected. Conclusion of law 5 provided:

> RCW 58.17.110 and YMC 16.12.170 make clear that [the City] must make findings of "appropriate provisions" for potable water supplies by the time of final

[5] Knight argues that the appellants agreed to amend the condition at the trial court. The record confirms this. *See* Report of Proceedings (RP) (Oct. 1, 2008) at 58 ("We would be perfectly happy with striking the "and/or" or simply striking the "/or," . . . . I believe all of us agreed to that."); CP at 1641 (Knights proposed conclusion of law 4 stating that the parties "have agreed that it is appropriate to amend the [condition's] language" by removing the word "/or.").

> plat approval. Based upon the present record and this Court's interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. A finding of "reasonable expectation" of potable water based upon [the City's] historical provision of potable water would be insufficient to satisfy this requirement.

CP at 1641.[6]

In its order, the trial court "reversed"[7] the matter and remanded the examiner's condition of preliminary plat approval with instructions to strike the word "or" and insert the word "also" as follows:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and . . . *also* prior to the issuance of any building permit . . . .

CP at 1644 (emphasis in original).

The trial court also imposed new notice requirements on the City. It ordered the City to provide Knight with notice of the following: any application for final subdivision approval of any of the five subdivisions; any proposed findings by the City pertaining to "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final

---

[6] We discuss the requirements of RCW 58.17.110 and YMC 16.12.170 in more depth below.

[7] Both appellants characterize the trial court's ruling as a reversal on "the undisputed issue of whether a determination of water availability [has] to be made both at the final plat approval and building permit stages" because it remanded for modification when "the meaning remained the same." Appellant's (Tahoma Terra) Br. at 20.

subdivision approval; and any city council hearing to consider final subdivision approval for any of the five subdivisions.[8] CP at 1645. Tahoma Terra and the City now appeal.

ANALYSIS

I. STANDARD OF REVIEW

LUPA governs judicial review of land use decisions. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 693, 49 P.3d 860 (2002). "By petitioning under LUPA, a party seeks judicial review by asking the superior court to exercise appellate jurisdiction." *Benchmark Land Co.*, 146 Wn.2d at 693 (quoting *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001)).

LUPA authorizes the superior court to reverse a land use decision if the party seeking relief shows that:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

[8] On appeal, the City emphasizes that its "primary concern and reason for appealing" is the trial court's imposition of special notice requirements for any future applications for future subdivision approvals and its entry of findings and conclusions. Appellant's (City) Br. at 2. It contends that, in its findings and conclusions, the trial court "purported to decide what water rights are held by the City and issued an advisory opinion that the City must make certain showings of water rights at final subdivision approval." Appellant's (City) Br. at 2. The City argues that these findings and conclusions are nullities on appeal, outside the trial court's jurisdiction, and contrary to the statute's plain meaning.

> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(a)-(f).

Judicial review of any claimed error under subsection (b) is de novo but we must accord deference to the City's expertise. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004); RCW 36.70C.130(1)(b). Under subsection (c), we must uphold the City's decision if there is evidence in the record that would persuade a fair-minded person of the truth of the statement asserted, and we must consider all evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless, LLC, v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006); former RCW 36.70C.130(1)(c). Under subsection (d), we must determine whether we are left "with a definite and firm conviction that a mistake has been committed." *Cingular Wireless, LLC*, 131 Wn. App. at 768; RCW 36.70C.130(1)(d).

In reviewing an administrative decision, we sit in the same position as the superior court. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Furthermore, when reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We must view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Finally, we review questions of law de novo. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003).

II. STANDING

The appellants argue that Knight lacked standing to appeal the examiner's decision to the City Council under the YMC and that she similarly lacks standing under LUPA.[9] Knight responds that the City's decisions will injure her senior water rights and that any "further groundwater withdrawal by the City will adversely impact the flow of groundwater that supports [her] wells and the flow of Thompson Creek where she has surface water rights." Resp't's Br. at 9. Knight claims that, even before approving the subdivision at issue in this case, the City's water use had already exceeded the total use amount determined by DOE. If the City "uses or commits water use to developers and future homeowners before [DOE] approves a water right for the City," she contends, her existing water rights are "jeopardized." Resp't's Br. at 26-27. The appellants' argument that Knight lacks standing to challenge the City's decisions is persuasive.

Under YMC 2.26.150, any "aggrieved person" or agency of record may appeal a hearing examiner's final decision to the City Council. Similarly, under RCW 36.70C.060(1), standing to bring a LUPA petition is limited to (1) the applicant and the property owner to which the land use decision is directed or (2) another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is "aggrieved or adversely affected" within the meaning of this

[9] The appellants devote a portion of their briefs to the argument that the trial court should have dismissed Knight's LUPA petition for failure to assign error to the City Council's "dispositive conclusion" that she lacked standing to appeal under RCW 36.70C.070. Appellant's Br. (Tahoma Terra) at 21. Additionally, Tahoma Terra argues that by failing to present evidence that she was "aggrieved" to the examiner, Knight foreclosed the opportunity to appeal his decisions under chapter 2.26 YMC. Appellant's (Tahoma Terra) Br. at 24. The appellants' argument that LUPA's procedural requirements act to bar her petition are unpersuasive; therefore, the foregoing analysis will examine the merits of the standing issue.

section only when (1) the land use decision has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those the local jurisdiction was required to consider when it made the land use decision; (3) a judgment in that person's favor would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and (4) the petitioner has exhausted his or her administrative remedies to the extent the law required. RCW 36.70C.060(2). The City construes both the YMC and LUPA as requiring the same thing.

To satisfy LUPA's "aggrieved or adversely affected" standing requirement, objectors must allege facts showing that they would suffer an "injury-in-fact" as a result of the land use decision; in other words, objectors must show that they "personally will be 'specifically and perceptibly harmed' by the proposed action." *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 47-48, 52 P.3d 522 (2002) (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992)).

Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to herself. *Trepanier*, 64 Wn. App. at 383. If the injury is merely conjectural or hypothetical, there can be no standing. *Trepanier*, 64 Wn. App. at 383. Pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected. *Snohomish County Prop. Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994).

As Tahoma Terra correctly notes, in order to establish standing under LUPA, Knight must demonstrate that: (1) the preliminary subdivision approvals have or are likely to prejudice her; (2) the interest she asserts is among those that the City was required to consider when it granted the preliminary subdivision approvals; (3) a judgment in her favor would substantially

eliminate or redress the alleged prejudice; and (4) she has exhausted her administrative remedies to the extent the law required. *See* RCW 36.70C.060(2)(a)-(d). Knight argues that the land use decisions at issue in this case are likely to prejudice her. She has not, however, demonstrated that she will be "specifically and perceptibly harmed" by the preliminary subdivision approvals themselves. *Thornton Creek Legal Def. Fund*, 113 Wn. App. at 48. Moreover, she fails to show that a judgment in her favor would substantially eliminate or redress the alleged prejudice. Therefore, Knight lacks standing to challenge the preliminary subdivision approvals at this time.

At this time, Tahoma Terra has not obtained final plat approval and has not submitted building permit applications. RCW 58.17.150(1) requires that Tahoma Terra provide adequate potable water to serve the subdivision for those applications. Recognizing this, the examiner conditioned preliminary approval on Tahoma Terra's ability to do so. Although his condition contained the now disputed "and/or" language, the record demonstrates that all parties understood and agreed that this condition required this showing at both final plat approval *and* building permit approval.[10] No one disputes this on appeal. Therefore, if Tahoma Terra cannot demonstrate its ability to provide an adequate supply of potable water at that time, the City cannot and will not grant final plat approval or issue building permits. If this occurs, then Knight will suffer no injury. If, on the other hand, there is adequate water supply at that time, then

[10] Furthermore, the examiner's finding reflected this: "While State law and the [YMC] require potable water supplies *at final plat approval and building permit approval*, the Examiner has added a condition of approval requiring such." CP at 1283 (emphasis added).

Knight will suffer no injury. As Tahoma Terra notes, the preliminary subdivision approvals therefore do not necessarily lead to the impacts Knight alleges.[11]

The City correctly argues that if we were to find that Knight had standing, we would first be required to presuppose a series of future events that may not ultimately occur. Furthermore, it would require us to agree with Knight's contention that, absent the trial court's judgment, she will not receive notice of any final plat or building permit approvals and will thus be unable to obtain judicial review of these decisions. Knight's alleged injuries are simply too remote to confer standing; the trial court should have granted the appellants' motions on this basis. Therefore, we affirm the challenged preliminary subdivision approvals, reverse the trial court, and dismiss Knight's LUPA petition for lack of standing.

III. ATTORNEY FEES

Finally, the City and Tahoma Terra argue that if they prevail on appeal, they are entitled to attorney fees and costs under RCW 4.84.370(1). Knight responds that their request "borders on the frivolous." Resp't's Br. at 55. She contends that the trial court did not uphold the City's decisions; rather, it "expressly" reversed and remanded those decisions. Resp't's Br. at 56.

RCW 4.84.370(1) provides that we shall award reasonable attorney fees and costs to the prevailing party or substantially prevailing party on appeal of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use

[11] Tahoma Terra also contends that even "[u]sing Knight's calculations," the City has "more total water rights" than necessary to serve its subdivision. Appellant's (Tahoma Terra) Br. at 29-30. Moreover, it notes, under RCW 90.03.380(1), DOE will not approve transfers or changes in water rights unless it finds that the transfers or changes will not detrimentally impact existing water rights.

approval or decision. We shall award and determine the amount of reasonable attorney fees and costs if:

> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party *if its decision is upheld at superior court and on appeal.*

RCW 4.84.370 (emphasis added).

Although the trial court remanded for modification of the examiner's condition, it ultimately upheld the City's decisions to grant the preliminary subdivision approvals. Therefore, the appellants' argument that they substantially prevailed below is persuasive. Because we affirm the City's decisions, we also grant the appellants' requests for reasonable attorney fees and costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JZ KNIGHT,

Respondent,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC, SAMATHA MEADOWS, LLC; TTPH 3-8, LLC,

Appellants.

No. 38581-3-II

ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT, JZ KNIGHT, moves for reconsideration of the Court's **April 13, 2010** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 17th day of June, 2010.

FOR THE COURT:

CHIEF JUDGE

APPENDIX C

Chapter 58.17 RCW
Plats — subdivisions — dedications

58.17.010
Purpose.

The legislature finds that the process by which land is divided is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state. The purpose of this chapter is to regulate the subdivision of land and to promote the public health, safety and general welfare in accordance with standards established by the state to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; to promote safe and convenient travel by the public on streets and highways; to provide for adequate light and air; **to facilitate adequate provision for water**, sewerage, parks and recreation areas, sites for schools and schoolgrounds and other public requirements; to provide for proper ingress and egress; to provide for the expeditious review and approval of proposed subdivisions which conform to zoning standards and local plans and policies; to adequately provide for the housing and commercial needs of the citizens of the state; and to require uniform monumenting of land subdivisions and conveyancing by accurate legal description.

[1981 c 293 § 1; 1969 ex.s. c 271 § 1.]

58.17.090
Notice of public hearing.

(1) **Upon receipt of an application for preliminary plat approval the administrative officer** charged by ordinance with responsibility for administration of regulations pertaining to platting and subdivisions **shall provide public notice and set a date for a public hearing**. Except as provided in RCW 36.70B.110, at a minimum, notice of the hearing shall be given in the following manner:

(a) Notice shall be published not less than ten days prior to the hearing in a newspaper of general circulation within the county and a newspaper of general circulation in the area where the real property which is proposed to be subdivided is located; and

(b) Special notice of the hearing shall be given to adjacent landowners by any other reasonable method local authorities deem necessary. Adjacent landowners are the owners of real property, as shown by the records of the county assessor, located within three hundred feet of any portion of the boundary of the proposed subdivision. If the owner of the real property which is proposed to be subdivided owns another parcel or parcels of real property which lie adjacent to the real property proposed to be subdivided, notice under this subsection (1)(b) shall be given to owners of real property located within three hundred feet of any portion of the boundaries of such adjacently located parcels of real property owned by the owner of the real property proposed to be subdivided.

(2) All hearings shall be public. All hearing notices shall include a description of the location of the proposed subdivision. The description may be in the form of either a vicinity location sketch or a written description other than a legal description.

[1995 c 347 § 426; 1981 c 293 § 5; 1974 ex.s. c 134 § 4; 1969 ex.s. c 271 § 9.]

58.17.110

Approval or disapproval of subdivision and dedication — Factors to be considered — Conditions for approval — Finding — Release from damages.

(1) **The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision** and dedication. **It shall determine: (a) If appropriate provisions are made for, but not limited to,** the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, **potable water supplies**, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

(2) **A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for** such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, **potable water supplies**, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name.

[1995 c 32 § 3; 1990 1st ex.s. c 17 § 52; 1989 c 330 § 3; 1974 ex.s. c 134 § 5; 1969 ex.s. c 271 § 11.]

58.17.130

Bond in lieu of actual construction of improvements prior to approval of final plat — Bond or security to assure successful operation of improvements.

Local regulations shall provide that in lieu of the completion of the actual construction of any required improvements prior to the approval of a final plat, the city, town, or county legislative body may accept a bond, in an amount and with surety and conditions satisfactory to it, or other secure method, providing for and securing to the municipality the actual construction and installation of such improvements within a period specified by the city, town, or county legislative body and expressed in the bonds. In addition, local regulations may provide for methods of security, including the posting of a bond securing to the municipality the successful operation of improvements for an appropriate period of time up to two years after final approval. The municipality is hereby granted the power to enforce bonds authorized under this section by all appropriate legal and equitable remedies. Such local regulations may provide that the improvements such as structures, sewers, and water systems shall be designed and certified by or under the supervision of a registered civil engineer prior to the acceptance of such improvements.

[1974 ex.s. c 134 § 7; 1969 ex.s. c 271 § 13.]

58.17.150
Recommendations of certain agencies to accompany plats submitted for final approval.

Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:

(1) Local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply;

(2) Local planning agency or commission, charged with the responsibility of reviewing plats and subdivisions, as to compliance with all terms of the preliminary approval of the proposed plat subdivision or dedication;

(3) City, town or county engineer.

Except as provided in RCW 58.17.140, an agency or person issuing a recommendation for subsequent approval under subsections (1) and (3) of this section shall not modify the terms of its recommendations without the consent of the applicant.

58.17.180
Review of decision.

Any decision approving or disapproving any plat shall be reviewable under chapter 36.70C RCW.

[1995 c 347 § 717; 1983 c 121 § 5; 1969 ex.s. c 271 § 18.]

58.17.200
Injunctive action to restrain subdivision, sale, transfer of land where final plat not filed.

Whenever any parcel of land is divided into five or more lots, tracts, or parcels of land and any person, firm or corporation or any agent of any of them sells or transfers, or offers or advertises for sale or transfer, any such lot, tract, or parcel without having a final plat of such subdivision filed for record, the prosecuting attorney shall commence an action to restrain and enjoin further subdivisions or sales, or transfers, or offers of sale or transfer and compel compliance with all provisions of this chapter. The costs of such action shall be taxed against the person, firm, corporation or agent selling or transferring the property.

[1969 ex.s. c 271 § 20.]

APPENDIX D

YELM MUNICIPAL CODE

CHAPTER 16.12

SUBDIVISION APPLICATION AND REVIEW PROCEDURES

(Excerpts - emphases added in bold font)

16.12.080 **Scheduling of public hearing**.

Upon receipt of the complete application, and in accordance with statutory deadlines, an application for binding site plan, large lot subdivision of five or more lots, or **preliminary full subdivision approval will be scheduled for public hearing before the decision-maker**, as identified below. (Ord. 436, 1992).

***

16.12.110 **Decision-maker**.

The final decision with regard to each preliminary full subdivision shall be made by the hearing examiner. The final decision with regard to each final full subdivision shall be made by the city council. The final decision with regard to each short subdivision shall be made by the city planner. The final decision with regard to each large lot subdivision of five or more lots shall be made by the hearing examiner. The final decision with regard to each large lot subdivision of four or less lots shall be made by the city planner. All final decisions not made by the city council are subject to appeal as set forth in Chapter 2.26 YMC. (Ord. 754 § 4, 2002; Ord. 436, 1992).

***

16.12.150 **Notice of public hearing**.

Not less than 10 days prior to the date of each public hearing, notice of any hearing shall be given by the city by first class mail to all of the property owners of record within 300 feet of the proposed plat or of contiguous land in the same ownership, whichever is greater. Not less than 10 days prior to the date of each hearing, notice of the of the hearing shall be given **by publication in the official newspaper of the city.** All hearing notices shall include a description of the location of the proposed subdivision including a vicinity location sketch or a written description other than a legal description. (Ord. 436, 1992).

***

16.12.160 **Required inquiry.**

The decision-maker shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. The decision-maker shall determine if appropriate provisions are made for, but not limited to, the public health, safety and general welfare for drainage ways, streets, alleys, other public ways, **water supplies**, sanitary waste, parks, playgrounds, and sites for schools and school grounds. The decision-maker shall consider conformance of the proposed subdivision with the requirements of this title and all other relevant facts and determine whether the public interest will be served by the proposed subdivision and any dedication. (Ord. 436, 1992).

16.12.170 **Findings and conclusions**.

A proposed subdivision and any dedication shall not be approved unless the decision-maker makes written findings that:

A. **Appropriate provisions are made for the public health, safety and general welfare and for** such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, **potable water supplies**, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, sidewalks and other features assuring safe walking conditions for students who only walk to and from school;

***

B. **Public facilities impacted by the proposed subdivision will be adequate and available to serve the subdivision concurrently with the development or a plan to finance needed public facilities in time to assure retention of an adequate level of service**;

***

Upon such findings the subdivision shall be approved. The decision-maker may require dedication of land to a public body, provision of public improvements to serve the subdivision, and/or impact fees as a condition of subdivision approval. Dedication shall be clearly shown on the plat. The decision-maker shall not as a condition of approval of any subdivision require a release from damages to be procured from other property owners. (Ord. 555 § 10, 1995; Ord. 436, 1992).

***

16.12.190 **Duration of preliminary approval**.

Approval of any preliminary plat shall be effective and binding upon the city for three years from the date of approval by the city. Prior to expiration of this three-year period a final plat or plats meeting all requirements and conditions of the preliminary approval may be submitted. Upon failure to submit a final plat prior to expiration of preliminary plat approval, no subdivision will be approved without submission and review of a new preliminary plat. (Ord. 436, 1992).

***

16.12.220 **Final application procedure**.

An application for final large lot subdivision, short subdivision, or full subdivision approval shall be submitted to the city on forms provided by the city and shall include the information set forth below.

***

B. The plat shall include the following statements, which may be combined where appropriate:

***

10. Certification by the public works director that the subdivider has complied with one of the following:

a. **All improvements have been installed in accordance with the requirements of this title and with the preliminary plat approval**, and that original reproducible mylar

road, utility and drainage construction plans certified by the designing engineer as being "as constructed" have been submitted for city records, **and/or**

b. **An agreement and bond or other financial security have been executed in accordance with Chapter 16.20 YMC sufficient to assure completion of required improvements and construction plans.** (Ord. 436, 1992).

***

16.12.310 **Council review**.

Upon receipt of all required administrative approvals, the community development director shall forward any proposed final full plat to the city council for appropriate action. Upon finding that the final plat has been completed in accordance with the provisions of this title and **that all required improvements have been completed or that arrangements or contracts have been entered into to guarantee that such required improvements will be completed,** and that the interests of the city are fully protected, the city council shall approve and the mayor shall sign the final plat and accept dedications as may be included thereon. The mayor shall immediately return the final plat to the city clerk/treasurer for filing for record with the county auditor. (Ord. 775 § 5, 2003; Ord. 754 § 4, 2002; Ord. 436, 1992).

16.12.330 **Effect of approval**.

A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision. Approved lots in a subdivision shall be a valid land use notwithstanding any change in zoning for a period of five years from the effective date of the final decision approving the subdivision. **A final plat shall vest the lots within such plat with a right to hook up to sewer and water for a period of five years after the date of recording of the final plat.** Thereafter, hookup to sewer and water shall be available on a first-come, first-served, basis as measured by the date of application for building permits, and subject to adequate capacity being available in the system. This limitation shall be stated on the face of all final plats. (Ord. 555 § 11, 1995; Ord. 436, 1992).

APPENDIX E

OFFICE OF THE HEARING EXAMINER

CITY OF YELM

REPORT AND DECISION

CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

SUMMARY OF REQUEST:

The applicant is requesting approval to allow subdivision of approximately 32 acres into 198 single family residential lots.

SUMMARY OF DECISION:

Request granted, subject to conditions.

PUBLIC HEARING:

After reviewing Planning and Community Development Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on July 23, 2007.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1" - Planning and Community Development Staff Report and Attachments
EXHIBIT "2" - Letter to Grant Beck from Jeff Schramm dated July 19, 2007
EXHIBIT "3" - Letter to Grant Beck from Clinton Pierpoint and Mark Steepy dated July 20, 2007
EXHIBIT "4" - Letter to Tahoma Terra LLC, Attn: Doug Bloom from William

a. The project is within an area approved for municipal water service pursuant to the adopted water comprehensive plan for the city;

b. Improvements necessary to provide city standard facilities and services are present or are on an approved and funded plan to assure availability in a time to meet the needs of the proposed development. (emphasis added)

The applicant's parcel is located in an area approved for municipal water service, and the documents submitted by the City provide a "reasonable expectation" that domestic water and fire flow will be available to serve the site upon submittal of applications for building permits or for final binding site plan approval. Much of the written evidence in the record addresses the present amount of available water and whether the Department of Ecology and Department of Health will grant the City additional water rights in the future. Such amounts to speculation until the City has made a specific application and agencies have made a specific decision. The Examiner finds most persuasive the letter from Skillings Connelly dated August 9, 2007, entitled "City of Yelm Projected Water Demand", which shows that upon transfer of the golf course and McMonigle water rights and by securing a new water right in 2012, the total cumulative water rights available to the City will far exceed the cumulative water demand. Both Skillings Connelly and the City Development Review Engineer see no need for additional water to serve anticipated development including this project.

16. RCW 58.17.110(2), a section of the State Subdivision Act, provides in part as follows:

> A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that:
>
> a. Appropriate provisions are made for...potable water supplies...and
>
> b. The public use and interest will be served by the platting of such subdivision and dedication.

The above section requires that prior to obtaining preliminary plat (or binding site plan) approval an applicant must establish that the project makes appropriate provision for potable water and fire flow. As previously found, GMA and the YMC consider that the impacts of development occur at the time of occupancy of a development; or in the present case, upon final binding site plan approval or the issuance of a building permit which would authorize construction of residential

> In the absence of more explicit statutory language, we interpret the authority of planning boards under the existing subdivision control law as not permitting disapproval of an otherwise proper plan on the ground that its execution would tax existing water sources. (emphasis supplied).

The Examiner could find no authority supporting either denial of a preliminary plat or requiring provision of domestic water and fire flow at the time of preliminary plat approval. Therefore, based upon the above authority, conditioning a preliminary plat to provide both domestic water and fire flow prior to final plat approval satisfies the provisions of RCW 58.17.110 and the YMC that require an applicant to show that a proposed preliminary plat makes appropriate provision for the public health, safety, and general welfare for potable water supplies and fire flow.

18. Mr. Moxon asserts that the City must provide 300 gallons of water per day for each equivalent residential unit (ERU) as set forth in Section V(C)(2)(c) of the City Comprehensive Joint Plan with Thurston County. Said section provides in part:

> For planning and concurrency purposes, the City requires 300 gallons per day per connection and 750 gallons per minute peak fire flow capacity in residential areas and Uniform Fire Code criteria for industrial and commercial areas, together with a reserve capacity of 15%...(emphasis added).

Section 13.04.120(C) YMC defines "ERU" as follows:

> (C) "Equivalent Residential Unit (ERU)" means the unit of measurement determined by that quantity of flow associated with a single residential household defined as follows:
>
> (1) ERU measurement shall be an equivalent flow of 900 cubic feet, or less, per month, based on water meter in-flow.(emphasis added)

Since one cubic foot equals 7.48 gallons, the total monthly flow equals 6,732 gallons or 224.4 gallons or less per day in a 30 day month. Such is substantially less than the 300 gallons set forth in the comprehensive plan.

19. The 300 gallons per day set forth in the comprehensive plan is for infrastructure planning purposes and utilized for sizing of pipes, pumps, etc. Furthermore, the Comprehensive Plan also provides in Section V(C)(2)(a):

> ...The city has an on-going program to acquire water rights to

Based upon the above documents, the following additional findings are hereby made as follows:

1. The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes that water rights from the Dragt farm have been conveyed to the City and approved by the State Department of Ecology (DOE). Evidence also shows the conveyance of water rights from the Nisqually Golf and Country Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If DOE does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.

2. While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon in his response are beyond the Examiner's authority and interfere with the City's ability to manage his public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

3. The Examiner has not considered additional issues raised in Mr. Moxon's Reply to Responses To Motions as such were not raised either at the hearing or during the reconsideration period. However, the Binding Site Plan (BSP) process parallels the subdivision process with preliminary and final site plan approval. The site plan considered at the public hearing is akin to a preliminary plat and not a final plat. Furthermore, the Planned Residential Development (PRD) process set forth in Chapter 17.60 YMC provides for a preliminary and final review process similar to the platting process.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

OFFICE OF THE HEARING EXAMINER

Dec 2007

CITY OF YELM

DECISION ON RECONSIDERATION

CASE NO.: SUB-07-0187-YL (TAHOMA TERRA PHASE II, DIVISIONS 5 AND 6)

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

By Report and Decision dated October 9, 2007, the Examiner conditionally approved the request for Binding Site Plan and Planned Residential Development approval for Tahoma Terra Phase II, Divisions 5 and 6. On October 19, 2007, J.Z. Knight, by and through her attorney, Keith E. Moxon, timely filed a Request for Reconsideration. On October 25, 2007, the Examiner circulated Mr. Moxon's reconsideration request to parties of record and their legal representatives and the City of Yelm and received the following responses:

A. Letter from Kathleen Callison, Attorney at Law on behalf of the City of Yelm, dated November 8, 2007.

B. Letter from Curtis R. Smelser, Attorney at Law on behalf of Tahoma Terra Division II, Phase 3 and 4, Divisions V and VI, dated November 8, 2007.

C. Memorandum from Alison Moss, Attorney at Law on behalf of Jack Long, dated November 8, 2007.

Pursuant to a request by Mr. Moxon, objected to by the City and the applicants' attorneys, the Examiner granted Mr. Moxon the opportunity to respond to the reconsideration responses. The Examiner also granted all counsel the opportunity to respond to Mr. Moxon. Mr. Moxon submitted his response on November 14, 2007, and Alison Moss submitted two responses on November 19, 2007, one on behalf of Jack Long and the other on behalf of Windshadow.

2. The following condition is added:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC.

DECISION:

The Request for Reconsideration is hereby denied with the exception of the addition of the condition of approval set forth in the conclusions above.

ORDERED this 7th day of December, 2007.

STEPHEN K. CAUSSEAUX, JR.
Hearing Examiner

TRANSMITTED this 7th day of December, 2007, to the following:

APPLICANT: TTPH 3-8 LLC
4200 6th Avenue SE #301
Lacey, WA 98503

AGENT: KPFF Consulting Engineers
4200 6th Avenue SE #309
Lacey, WA 98503

OTHERS:

Keith Moxon
2025 First Avenue, Ste. 500
Seattle, WA 98115

Matthew Schubart
P.O. Box 192
McKenna, WA 98558

Curt Smelser
1420 5th Avenue Ste. 3010
Seattle, WA 98101

Doug Bonner
8120 Freedom Lane #201
Lacey, WA 98516

Alison Moss
2183 Sunset Avenue SW
Seattle, WA 98116

Kathleen Callison
802 Irving Street SW
Tumwater, WA 98512

APPENDIX F

17

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
08 SEP 26 PM 4:10
BETTY J. GOULD, CLERK
BY _____ DEPUTY

☐ EXPEDITE
☐ No hearing set
➢ Hearing is set
Date: October 1, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

JZ KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

DECLARATION OF KEITH E. MOXON IN SUPPORT OF LUPA APPEAL

ORIGINAL

Keith E. Moxon declares under penalty of perjury of the Laws of the State of Washington as follows:

1. I am an attorney in the law firm of GordonDerr LLP. I have personal knowledge regarding the facts set forth in this declaration.

2. Attached hereto as Exhibit A are true and correct copies of excerpts from the City of Yelm's *Site Plan Review Approval dated February 14, 2008, Killion Crossing LLC* (SPR-

GordonDerr
2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

0700320-YL - 3 commercial buildings, 22,208 square feet) and the City of Yelm's *Staff Report dated June 23, 2008, Purvis Residential Development* (SUB-07-0397-YL – first phase of 160-lot subdivision).

3. Attached hereto as Exhibit B are true and correct excerpts from the City of Yelm's 2002 Comprehensive Water Plan (Table 4.2 and pages 4-11 through 4-17) which confirm that the City of Yelm knew about the 501 afy limitation on its first three water rights and knew that the 112 afy non-additive water right could not lawfully be included in the City's "base" water rights.

Dated this 26th day of September, 2008.

Keith E. Moxon

GordonDerr
2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

EXHIBIT A

STAFF REPORT

City of Yelm
Community Development Department

Case Number: **SPR-07-0320-YL**

Date: **February 14, 2008** — 2 days after City Council approval of five subdivisions

Applicant: **Cornerstone Architectural Group**
Steve Barnes
1904 3rd Avenue
Suite 600
Seattle, WA 98125

Owner: **Killing Crossing LLC**
Krista James-Blackburn
3726 Broadway
Suite 301
Everett, WA 98201

Agent: **Barghausen Engineers**
18215 72nd Avenue South
Kent, WA 98032

Request: **Construct three commercial buildings of approximately 22,719 square feet.**

Recommendation: **Approval with conditions**

Findings of Fact

Proposal and Site Characteristics

The proposal is for site plan review in order to construct three commercial buildings of approximately 22,208 square feet on a 2.79 acre parcel of land. The proposal includes approximately 2,900 square feet of fast food service, and 19,308 square feet of general retail.

The property is located on the northwest corner of Yelm Avenue West (SR 510) and Killion Road.

improvement has not been determined at the time payment is due, the payment shall be based on the projected cost of the improvement at the time payment is due.

3. Ingress and egress access on Yelm Avenue West (SR 510) shall be located directly across from the proposed access to the commercial property across SR 510 to the southwest.
4. Any existing wells and on-site sewage disposal systems shall be abandoned pursuant to applicable Washington State and Thurston County health regulations. Evidence that all wells and sewage disposal systems have been abandoned in an approved manner shall be provided prior to approval of civil engineering plans.

Concurrency

Chapter 15.40 YMC requires the reviewing authority to determine that required urban infrastructure is available concurrent with development.

Concurrency with sewer infrastructure is achieved pursuant to Section 15.40.020 (B)(1) YMC when the project is within an area approved for sewer pursuant to the adopted sewer comprehensive plan for the city and improvements necessary to provide city standard facilities and services are present to meet the needs of the proposed development.

The sanitary sewer system has sufficient capacity to serve the proposed use and there are existing sewer lines located within Yelm Avenue West (SR 510), and Killion Road. The applicant is required to construct all sewer related requirements to the standards of the Yelm Development Guidelines.

Concurrency with water infrastructure is achieved pursuant to Section 15.40.020 (B)(2) YMC when the project is within an area approved for municipal water service pursuant to the adopted water comprehensive plan for the city and improvements necessary to provide city standard facilities and services are present.

The property is within the water service area as identified in the Yelm Water Plan. The water system infrastructure has sufficient capacity to provide potable water to the proposed use and the developer will be required to connect to the system. The developer will also be responsible for ensuring that the requirements of the adopted Fire Codes are met through the provision of adequate fire flow, or construction methods that reduce the required fire flow.

Although water rights are not required to find concurrency, which deals with utility infrastructure, the City has and continues to work towards the acquisition of additional water rights sufficient to serve the entire water service area and has a reasonable expectation that water rights will be in place at the time potable water is required at the time of building permit issuance.

Decision

The request for site plan review approval is hereby granted subject to the conditions contained in the conclusions above.

Prepared this 14th day of February, 2008

Tami Merriman, Associate Planner

APPROVED this14th day of February, 2008

Grant Beck, Director of Community Development
Site Plan Review Committee
City of Yelm

Appeal

Site Plan Approval is a Type II Administrative land use approval. An appeal of this decision can be filed within 14 days from the date of this approval, pursuant to YMC, Chapter 15.49, Integrated Project Review Process. Any appeal must be in writing, contain specific factual objections, and include the appeal fee of $50.00.

City of Yelm

Community Development Department
105 Yelm Avenue West
P.O. Box 479
Yelm, WA 98597

Hearing Date:	June 23, 2008
Case Number:	SUB-07-0397-YL Purvis Residential Development
Applicant:	Tahoma Terra, LLC 4200 6th Ave. SE, #301 Lacey, WA 98503
Agent:	KPFF Consulting Engineers 4200 6th Ave. SE, Suite 309 Lacey, WA 98503
Request:	Approval of 24 single family residential lots as Phase I of a subdivision of approximately 50 acres into 160 single family dwelling units.
Recommendation:	Approval of Phase I with conditions.
Exhibit I:	Site plan & Application materials (on disk)
Exhibit II:	Notice of Application & Comment Letters
Exhibit III:	Mitigated Determination of Non-Significance & Comment Letters
Exhibit IV:	Public Hearing Notice

Proposal

The applicant is proposing to subdivide approximately 50 acres into 160 single-family residential lots in a phased development. Phase I includes approximately 6.43 acres to be subdivided into 24 single-family residential lots. The property is zoned R-4 Low Density Residential, which allows up to 4 dwelling units per acre.

Property Characteristics

The property is located at 14504 Berry Valley Road SE and is identified by Assessor's Tax Parcel numbers 21723140102, 21723140101, 21724230100. The site is currently in use as a single family residence with 5 additional mobile homes. The existing home and mobiles are proposed to remain until future phases of development. The site is varying in topography, and the majority of the land has been pasture for varying farm animals. An existing barn will be demolished.

The subject property is bound to the west and south by properties which are zoned Master Planned Development (MPD). Master planned developments allow for mixed

standard facilities and services are present to meet the needs of the proposed development.

The project is within the sewer service area. The developer will be required to connect to the sewer lines installed in Tahoma Terra Divisions 3 & 4 located to the south of the subject property and extend service as needed to serve the proposed development. Improvements required to serve the project will be specifically identified during civil plan review and will have to be installed by the developer and approved by the City prior to final subdivision approval. This satisfies the requirement for concurrency with sewer infrastructure.

Concurrency with water infrastructure is achieved pursuant to Section 15.40.020 (B)(2) YMC when the project is within an area approved for municipal water service pursuant to the adopted water comprehensive plan for the city and improvements necessary to provide city standard facilities and services are present.

The project is within Yelm's water service area. The developer will be required to connect to the water lines installed in Tahoma Terra Divisions 3 & 4 located to the south of the subject property and extend service as needed to serve the proposed development. Improvements required to serve the proposal, including providing fire flows and potable water, will be specifically identified during civil plan review and will have to be installed by the developer and approved by the City before final subdivision approval. This satisfies the requirement for concurrency with water infrastructure.

Although water rights are not required to find concurrency, which deals with utility infrastructure, the City has and continues to work towards the acquisition of additional water rights sufficient to serve the entire water service area and has a reasonable expectation that water rights will be in place at the time potable water is required at the time of building permit issuance.

Concurrency with transportation infrastructure is achieved pursuant to Section 15.40.020 (5)(c) YMC when the project:

- ✓ Makes on-site and frontage improvements consistent with city standards and roads necessary to serve the proposed project consistent with safety and public interest;
- ✓ Makes such off-site facility improvements, not listed on the capital facilities plan, as are necessary to meet city standards for the safe movement of traffic and pedestrians attributable to the project;
- ✓ Makes a contribution to the facilities relating to capacity improvements identified in the adopted six-year traffic improvement program, in the form of a transportation facility charge.

The site is served by new roads constructed in the master planned community to the south. There are no frontage streets. The traffic impact analysis showed no measurable impact created from the 24.24 trips created. The model did show impacts

13. The 150 foot wetland buffer shall be left undisturbed and dedicated as open space. Interpretive signage for the wetland is required. This could include the stormwater facilities role in the wetland's function.

14. Future phases of this development shall provide for active recreational components.

15. Prior to civil plan approval, the applicant will provide the Community Development Department an addressing map for approval.

16. Prior to final plat application, a subdivision name must be reserved with the Thurston County Auditor's Office.

Conclusion:

Based on the Analysis and Conditions of Approval above, staff recommends that the Hearing Examiner approve SUB-07-0397-YL.

APPENDIX G

RCW 19.27.097

Building permit application — Evidence of adequate water supply — Applicability — Exemption.

(1) **Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.** In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.

(2) Within counties not required or not choosing to plan pursuant to RCW 36.70A.040, the county and the state may mutually determine those areas in the county in which the requirements of subsection (1) of this section shall not apply. The departments of health and ecology shall coordinate on the implementation of this section. Should the county and the state fail to mutually determine those areas to be designated pursuant to this subsection, the county may petition the *department of community, trade, and economic development to mediate or, if necessary, make the determination.

(3) Buildings that do not need potable water facilities are exempt from the provisions of this section. The department of ecology, after consultation with local governments, may adopt rules to implement this section, which may recognize differences between high-growth and low-growth counties.

[1995 c 399 § 9; 1991 sp.s. c 32 § 28; 1990 1st ex.s. c 17 § 63.]

APPENDIX H

5

Superior Court of the State of Washington
For Thurston County

BUILDING NO. 2, COURTHOUSE
2000 LAKERIDGE DRIVE S.W. • OLYMPIA, WA 98502
TELEPHONE (360) 786-5560 • FAX (360) 754-4060

October 7, 2008

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
08 OCT -7 PM 2:46
BETTY J. GOULD, CLERK
BY _____ DEPUTY

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1420 5th Ave., Suite 3010
Seattle, WA 98101

Re: *J Z Knight v City of Yelm et al*
Thurston County Superior Court No. 08-2-00489-6

LETTER OPINION

Dear Counsel:

A hearing in this action on Petitioner J Z Knight's Land Use Petition was held on October 1, 2008. The decision of the court follows.

At the time of argument, Petitioner had reduced the issues requiring adjudication to the following: (1) may the City of Yelm delay until issuance of building permits

proof of a potable water supply to support the development being permitted; and (2) what level of proof of adequate potable water must be shown to allow the development?

This petition is brought under the Land Use Petition Act ("LUPA"), RCW 36.70. Standards for granting relief are set forth in RCW 36.70C.130. Petitioner claims that the decision in this case by Respondent City of Yelm ("the City") should be reversed because (1) it is an erroneous interpretation of the law; (2) the City's determination of water availability is not supported by substantial evidence; and (3) the City's determination of water availability is a clearly erroneous application of the law to the facts.

The hearing examiner in this case had granted preliminary approval to five proposed subdivisions with the following condition:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC [Yelm Municipal Code].

At hearing, the City agreed to amend the language of this condition to remove "/or" to make clear that proof of adequate potable water must be made at the time of final plat approval and not as late as issuance of a building permit. Although Petitioner had earlier argued for proof at time of preliminary plat approval, she had withdrawn this request at hearing. The other parties appear to be in agreement with the City's position on this issue.

This resolution is consistent with the law. Preliminary plat approval can be conditioned on the applicant resolving identified issues before final plat approval. 17 Stoebuck and Weaver, Real Estate: Property Law, Washington Practice series, p. 282 (2004). However, all requirements must be met and confirmed in written findings before final approval. RCW 58.17.110. It is of course possible for the applicant to provide a bond or other assurance of meeting the final conditions. RCW 58.17.130. The law is clear that these conditions must be met before the building permit stage. The condition as written is an erroneous interpretation of the law. RCW 36.70C.130. The Court, therefore, will sign an order reversing the City on this issue and remanding it to the City to amend the condition accordingly.

The second issue, however, is still in dispute. Petitioner has presented evidence in the hearing below to support its position that the City has been issuing building permits since 2001 that committed it to the supply of water in excess of its water

rights. *Amicus* Department of Ecology indicates that at the time of the hearing in this case, the City held primary (additive) water rights authorizing use of a total of 719.66 ac-ft/yr. Ecology agrees with Petitioner that the City's usage records show that the amount of water used by the City in recent years exceeds its 719.66 ac-ft./yr primary water right allocation. After the record was closed, the City acquired and Ecology approved for municipal supply 77 ac-ft/yr of additional primary water rights. This brings the City's total primary water rights to 796.66 ac-ft/yr. Ecology calculates the resulting demand on the City following final approval of the subdivisions at issue in this case would be 910.53 ac-ft/yr. At present, therefore, the City does not have "a potable water supply adequate to serve the development ..."

The question, then, is what should the applicant-Respondents need to show at final plat approval regarding supply of potable water? The City asserts that it has a good record of developing additional water rights in time to service new customers. It also notes that many approved subdivisions have not been fully built and therefore are not drawing on the City's supply. Given the length of time necessary to plan, permit, approve, and build homes, the City argues it is unreasonable to require proof of available water rights for all approved (built and unbuilt) subdivisions at time of final approval. Petitioner, who holds her own water rights, argues that to allow the City to continue to provide final approval without committed water rights will lead to diminution of her own water rights.

Ecology, though not a party in this case, is the administrator of water resources in the State of Washington. RCW 43.21A, RCW 90.03, RCW 90.14, RCW 90.44, and RCW 90.54. The Washington Water Code requires that Ecology determine whether water sought is physically and legally available for use. The Nisqually River Basin is the subject of rules and restrictions regarding water appropriation because of the importance of stream flow in the basin. The City is in that watershed.

Respondent TTPH 3-8 (Tahoma Terra) has obtained water rights for transfer to the City to assist the City in meeting its obligation to ensure adequate potable water. Tahoma Terra argues that those transfers should be considered in determining whether the condition in the preliminary plat approval has been met in its case. The City argues that unbuilt subdivisions should not be considered in calculating the ability of the City to deliver potable water. In addition, the City argues it has a good record in developing additional capacity for potable water and it should not be subject to a limitation because of its present level of water rights when it will most likely have sufficient potable water when these subdivisions go online.

The City also argues that the question of what proof of ability to provide a potable water supply adequate to serve the development at final plat approval is not ripe for adjudication. Petitioner counters that it is not entitled to notice of final plat approval and that there may not be another clear opportunity for this issue to be considered by a court.

RCW 58.17.110 provides, inter alia, that

> (2) A proposed subdivision ... shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for ... potable water supplies ...; and (b) the public use and interest will be served by the platting of such subdivision and dedication.

The Yelm Municipal Code (YMC) provides:

> A proposed subdivision and any dedication shall not be approved unless the decision-maker makes written findings that:
> A. Appropriate provisions are made for the public health, safety, and general welfare and for ... potable water supplies.
> D. Public facilities impacted by the proposed subdivision will be adequate and available to serve the subdivision concurrently with the development or a plan to finance needed public facilities in time to assure retention of an adequate level of service.

So it is clear that the City must make findings of "appropriate provisions" for potable water supplies in this case by the time of final plat approval. The question of whether such a finding must be based on water rights held by the City at the time of final plat approval is apparently a case of first impression. Since final plat approval is expected at some time in the future and since a reviewing city or other governmental agency might be faced with a situation different than the apparent present circumstances of the City in this case, it seems appropriate to defer the determination of "appropriate provision" until the time of final plat approval. If the determination were to be made today on this record, this Court would conclude the City would have to require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. The City's suggested finding of a "reasonable expectation" based on historical provision of potable water would be considered insufficient to satisfy this condition.

This Court will remand the case to the City of Yelm for the amendment of the condition as described above, deleting the "/or" to make clear that the finding of adequacy must be made no later than final plat approval; and for further consideration of the applications consistent with this decision. Petitioner is entitled to notice of the entry of findings by the City on the issue of "appropriate provisions ... for potable water supplies" at such time as they are made on each application and may then seek appropriate court review, if necessary.

Counsel may present a revised proposed order consistent with this decision with notice to opposing parties on any civil motion calendar.

Sincerely,

Chris Wickham
Superior Court Judge

CC Clerk, for filing
Maia Bellon, Assistant Attorney General, *Amicus* Department of Ecology

APPENDIX I

THE COURT: Before you get to the specifics, let me respond to the first comment. In the materials that you have submitted are two newspaper articles, and both of those newspaper articles describe a decision which I don't recognize, and all I can conclude is that both sides put a spin on this Court's decision to suit their own particular needs.

Now, that tells me that it's important that the public and anyone else understand the basis for this Court's decision and exactly what was or was not decided. Under those circumstances, I can see value for Findings and Conclusions, but I recognize that those Findings and Conclusions do not usurp the authority of the City, who is the fact finder.

On the other hand, I have been involved in enough administrative reviews where it was unclear to me what the administrative body was doing and how they reached the result that they did.

I would consider the Findings and Conclusions proposed in this case as in that regard, and I think they are helpful, and I think they are important, although I agree with you that it's unusual for them to be utilized in a case like this, but I think this is one of those exceptional cases where they would be helpful. So I'm going enter them. So let's go

through them one by one.

I think you said one and two are more or less okay.

MR. SCHNEIDER: I won't speak for my co-counsel, your Honor, but I think they are basically harmless. No. 3 would be acceptable, your Honor. No. 4 has the Court basically saying that, again, we are getting into this disputed area, which I understood the Court to clearly agree was not before it, which is what are the approved water rights that are before the City. It's -- this is not an adjudication of water rights. We are talking here about the limits of the Court's jurisdiction, and No. 4 has the Court saying, you know, the record contains evidence that the City has committed water in excess of the Department of Ecology approved water rights.

Well, that was disputed. The Court didn't resolve that dispute, because the Court recognized it doesn't have jurisdiction.

THE COURT: But the record does contain that evidence.

MR. SCHNEIDER: It contains evidence. If you are going to have a statement in here about the evidence presented by one side, why isn't there a

hand out, and that says, "The City Council would make a determination that it has to find that the final plat has been completed and that all required improvements have been completed." So that has to be done, and for water that can only mean that the water system improvements are in the pipes in the ground; the water is available to the lots, "or that arrangements or contracts have been entered into to guarantee that such required improvements will be completed."

It's an absolute term, and again we don't know how a city can propose through bonding or some other security arrangements that they will have sufficient water rights or that they will have a supply of water, if they don't know to meet -- to allow them to approve final plats when you can't bond around getting Ecology approval of future water rights.

And I think really the key provision is the very last section of this ordinance, and this is not in state law. This is in the City's subdivision code. They have imposed this requirement upon themselves, and I have highlighted the sentence that says, "A final plat shall vest the lots within such plat with a right to hookup to sewer and water for a period of five years after the date of recording the final

plat."

So not only do they say there has to be a guarantee that required improvements will be completed if they don't have them in place now before final plat approval, they have an obligation under their own ordinance to guarantee that every lot within that plat is going to have the right to hookup and have water for a period of five years. If it doesn't get built within five years, presumably then as the rest of the section says, those lot owners would be on a first-come-first-serve basis.

At the public hearings in July of last year, the City provided no evidence on the availability of a water supply. We submitted evidence of the City's water rights, 564 acre-feet, plus the Dragt transfer that was accomplished in December of 2006, which gave them a total of 719.66 acre-feet per year, and we have used "AFY" for that abbreviation.

The hearing examiner then allowed the City to submit post-hearing evidence regarding water supply. The City claimed 832 acre-feet, but that included 112 acre-feet of what Ecology has clarified, and we pointed out a year and a half ago, it included 112 acre-feet of nonadditive water rights.

So while they could say their water rights were

676 acre-feet, they have to acknowledge and they did in their water system plan document, they acknowledged they were limited to that and they would have to remove that limitation in order to gain full access to the water rights. They only had 564 acre-feet of water, and they can't count the 112 acre-feet, and I don't think there is any question in anybody's mind about that now.

Also in these post-hearing submissions, the City admitted that it had used 766 acre-feet of water in 2006. So it had already exceeded its lawful water rights. In fact, the record submitted by the City showed that they have been exceeding their lawful water rights since 2001.

The hearing examiner ruled that the City had shown a reasonable expectation of adequate future water rights, but he really based that solely on a letter from Skilling Connolly that said, the consultant said, we are showing the estimated projected demand and we are showing water rights, but the water rights information is coming from the City's attorney.

So they plugged in a number showing that by the year 2012, the City would get 3,000 acre-feet of more water. That is an astounding amount of water, and

its own comprehensive water plan said that those kinds of transfer of water acquisitions are unlikely in this area and pointed out that that was not a reasonable expectation, even if it was a legitimate -- even if there were other supportive evidence to support that, which there wasn't.

The hearing examiner then issued a decision originally that said, well, it's okay to approve these preliminary plats, so long as I condition them to impose a condition that they have water on final plat approval. But the problem is his decision didn't do that. He said in his findings he would do that, so we moved on reconsideration.

In response, the hearings examiner entered -- added a conclusion that says, the City has to show water availability at final plat and/or building permit stage, and that's really the heart of this issue now, because we are willing to say that as long as the City agrees it will have to show -- it will have to make a meaningful determination of water rights, and in our mind the only way they can do that -- of water availability -- and the only way can do that is with water rights, we are ready to let all these other flawed preliminary plats go away, because it's really harmless that they approve a preliminary

plat, so long that there is a condition that says you can't go to final plat approval, you can't let these lots be final platted, lots get sold, rights to hookup ripen, and the City doesn't have water established by water rights.

I don't know why or how the City has allowed themselves to get into this situation, but it's clearly a situation that isn't envisioned by the subdivision law or the City's own concurrency code.

What's interesting is that within two days of the City Council affirming that decision, the City began issuing staff reports and site plan approvals saying that it had a reasonable expectation water rights will be in place at the time water is required at the time of building permit issuance.

So they immediately shifted and said, okay, we only have to have water rights in place at the building permit stage. That is why we are very skeptical of the City's position for the reason that the City has not acted in accordance with what they are saying in their briefing to this Court.

The City has not said, oh, we agree, we will have water availability requirements imposed at final plat. Everything that has happened since the City Council decision in February has shown that the City

intends to only hold out that they have to have water rights at the time of building permit issuance.

And only now when they see the handwriting on the wall or something are they changing that position, but it really is disingenuous for the City to say, oh, we have always understood it to mean final plat approval. They have been acting all along that they are going to hold off until building permit stage to require water.

The second thing that is important is that the City's recent action is that the City always discusses its potable water supply in terms of its water rights. Even when they are protesting that they shouldn't be bound by water right calculations by anybody, they point to Ecology communications that they prefer to show that they have a potable water supply, and it's always based on water rights.

We haven't heard anybody, and we would challenge the petitioners, the respondents, to show what other evidence of potable water supply in the City of Yelm could there be other than a legal water right grounds for potable water. They can't say, well, we will use exempt wells. They can't say, we will get a water transfer from some other purveyor. Their potable water supply is defined by their water rights. So

they have to show water rights to show potable water supply.

I believe the inference shows that this record doesn't support preliminary plat approval, but we are prepared to say that these five subdivision approvals can stand, so long as there is a clear condition of approval to ensure that the City will make a meaningful determination of water availability prior to final plat approval.

The City's own subdivision code requires a finding that prior to final plat approval that all required improvements have been completed, which would have to apply to their water system, and I guess they could argue all we have to do is put pipes in the ground, but we don't have to have water in the pipes, and for me that would be just a ludicrous argument.

So either they have to complete the improvements for the water service or they have to show that arrangements or contracts have been entered into to guarantee that such improvements will be completed. Maybe they can do that with a bond to put pipes in the ground, but they certainly can't put water in the pipes with a bond, because you can't bond around the risk that Ecology would not approve a future water

right.

Now, the City has been arguing that this condition to require water availability at final plat isn't required, because they already understand they will have to provide water at final plat, but I think they have been really a bit disingenuous about that, because they haven't said that means water rights.

I think we can expect, having been in this for a year and a half, that the City would simply write a letter to itself saying we have enough water to serve this plat, and that they would consider that to be a determination of water availability.

The City said it shouldn't be required to provide adequate water rights proof before final plat approval, and our question is what other evidence of potable water supply could there be? For the City of Yelm, the only evidence of potable water supply is Ecology-approved water rights granted to the City.

The City argues that it should be granted substantial discretion and leeway based on its huge successes in water conservation and reclaimed water and water rate adjustments, finding additional water rights, et cetera. Our response is that the harsh reality is that the City of Yelm has not been successful in managing its water system, and every

year since 2001 the City of Yelm has exceeded its water rights.

Not only has the City not avoided a water deficit during this time, it has continued to approve a huge amount of residential and commercial development, including these subdivisions, but there are others for which it has no reasonable prospect of adequate water rights.

And we are okay with that, if, at the time these final plats come to the City for approval, the City will be able to show that it has an available water supply substantiated by lawful water rights approved by Ecology.

And we respectfully urge this Court to enter an order remanding this, and the order can allow these to be approved but subject to a clear condition requiring evidence of approved water rights prior to final plat approval, and we have prepared an order that also takes up the City's suggestion that since it's working on its water system plan that the water system plan update should be completed prior to final plat approval for these subdivisions.

That is expected in the spring, and the City has been saying none of these are going to come anywhere in the near future, so we think that would be a

reasonable requirement. We think that will tie together all these loose ends about the Department of Health, the Department of Ecology's view of the City's water system. So we would respectfully urge that this Court allow these subdivisions to go forward.

And we represent developers in our law firm, and we recognize that we don't need to send these plats back to ground zero. They don't have to start over with a new public hearing, but it's also a risk for us to say that we can just approve things when they come along at final plat, because the final plat approval is not subject to public notice.

Those are administrative approvals that go through the City Council, and unless there is a condition requiring them to notify us, we don't want to bear the risk of having to keep track of when the City would take these final plats up. As long as there is a condition of approval now that says the City will have water rights at the time of final plat approval, we are okay to let these preliminary subdivisions go forward. Thank you.

THE COURT: Before you sit down, is there some dispute about the math in calculating how much water is available?

MR. MOXON: Yeah.

THE COURT: Who does the math at final plat approval? Whose numbers do you use?

MR. MOXON: I think the City does, and we expect that the City -- the concurrency ordinance says concurrency will be based on the comprehensive plan. It says that. The comprehensive plan says for planning and concurrency 300 gallons per -- it isn't per ERU, it's per connection.

If the City has evidence that shows that it's meeting its water demand, it provides metering data to Ecology, we get copies of that, that is all trackable.

We aren't talking about whether there is a close call in the future about whether the City can show it's going to have water. We are talking about a city who has got a significant deficit, a backlog of a crude development for which it has no reasonable prospect of approved water rights and a need to work that out.

So if they want to come up with a 224-gallons-per-day ERU, that's fine with me. We are not here to dictate that. I don't think the Court should dictate that. That is not our business. Our business is just to say in the big picture terms the

APPENDIX J

EXHIBIT A

7

FILED
SUPERIOR COURT
THURSTON CO. WA

'08 NOV -7 P2:05

BY

☐ EXPEDITE
☐ No hearing set
➢ Hearing is set
Date: November 7, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

AMENDED FINDINGS AND CONCLUSIONS

[PROPOSED]

THIS MATTER came before the Court on the petition of Petitioner JZ Knight pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"). Petitioner challenged the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

The Court considered the following evidence:

1. The record evidence for each of the five proposed subdivisions, including the City of Yelm files for these projects, the Hearing Examiner's Report and

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Seattle, WA 98121-3140
(206) 382-9540

Decision dated October 9, 2007, the Hearing Examiner's Decision on Reconsideration dated December 7, 2007, and all exhibits and attachments listed in the Hearing Examiner decisions.

2. Petitioner's and Respondents' submissions to the Hearing Examiner;

3. Petitioner's and Respondents' submissions to the Yelm City Council;

4. The Yelm City Council's decision on the five proposed subdivisions;

5. Petitioner's LUPA appeal petition;

6. Petitioner's and Respondents' other submissions to this Court;

7. The Amicus brief provided by the Washington State Department of Ecology and Respondents' responses thereto;

8. Oral argument of the parties; and

9. The pleadings and records on file in this action.

Based on the evidence in the record and the applicable law, the Court makes The following Findings of Fact and Conclusions of Law.[1]

I. FINDINGS OF FACT

1. Petitioner brought this petition under the Land Use Petition Act ("LUPA"), RCW 36.70. Standards for granting relief are set forth in RCW 36.70C.130. Petitioner claims that the decision of Respondent City of Yelm ("Yelm") (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6) should be reversed because (1) it is an erroneous interpretation of the law; (2) the City's determination of water availability is not supported by

[1] Any finding of fact that may be deemed a conclusion of law is incorporated into the Conclusions of Law section, and any conclusion of law that may be deemed a finding of fact is incorporated into the Findings of Fact section.

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substantial evidence; and (3) the City's determination of water availability is a clearly erroneous application of the law to the facts.

2. On October 9, 2007, the Yelm Hearing Examiner granted preliminary approval of the five proposed preliminary subdivisions. Following Petitioner's request for reconsideration, on December 7, 2007, the Hearing Examiner entered a decision on reconsideration that contained the following condition:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC [Yelm Municipal Code] (emphasis added).

3. At the hearing before the Court, Yelm agreed to amend the language of this condition to remove the word "/or" to make clear that proof of adequate potable water must be made at the time of final plat approval and may not be deferred to the time of building permit approval. The other Parties appear to be in agreement with the City's position on this issue.

4. The record contains evidence that Yelm has been issuing building permits and other approvals since 2001 that committed Yelm to the supply of water in excess of its Department of Ecology ("Ecology") approved water rights. Amicus Ecology indicated that at the time of the Hearing Examiner proceedings in this case, Yelm held primary (additive) water rights authorizing use of a total of 719.66 acre feet per year ("afy"). Prior to December 2006, Yelm's water right totaled 564 afy. Yelm's usage records show that the amount of water used by the City since 2001 exceeded its legal water rights.

5. Ecology is the administrator of water resources in the State of Washington, pursuant to Chapter 43.21A RCW, Chapter 90.03 RCW, Chapter 90.14 RCW, Chapter 90.44 RCW, and Chapter 90.54 RCW. The Washington Water Code requires that Ecology determine whether water sought is physically and legally available for use.

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6. The Nisqually River Basin is the subject of rules and restrictions regarding water appropriation because of the importance of stream flow in that basin. Yelm is in that watershed.

7. After the record in this case was closed, Yelm acquired and Ecology approved for municipal supply 77 afy of additional primary water rights. This brings Yelm's total primary water rights to 796.66 afy. According to Ecology, the resulting demand on Yelm's water supply following final approval of the subdivisions at issue in this case will be 910.53 afy, which does not consider other developments approved by Yelm. At present, therefore, the City does not have "a potable water supply adequate to serve the development . . .".

8. Respondent TTPH 3-8 (Tahoma Terra) has obtained water rights for transfer to Yelm to assist Yelm in meeting its obligations to ensure adequate potable water is available to serve its proposed development. Only some of these transfers have been approved by Ecology.

II. CONCLUSIONS OF LAW

1. The issues presented for final resolution in this matter involve the interpretation and application of RCW 58.17.110 and Yelm Municipal Code (YMC) Chapter 16.12.

a. RCW 58.17.110 provides, *inter alia*, that:

> (2) A proposed subdivision . . . shall not be approved unless the city, town, or county legislative body makes written findings that (a) Appropriate provisions are made for . . . potable water supplies . . .; and (b) the public use and interest will be served by the platting of such subdivision and dedication.

b. YMC 16.12.170 further provides that:

> A proposed subdivision and any dedication shall not be approved unless the decision-maker makes written findings that:
>
> A. Appropriate provisions are made for the public health, safety, and general welfare and for . . . potable water supplies.

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D. Public facilities impacted by the proposed subdivision will be adequate and available to serve the subdivision concurrently with the development or a plan to finance needed public facilities in time to assure retention of an adequate level of service.

c. In relevant part, YMC 16.12.310 provides:

Upon finding that the final plat has been completed in accordance with the provisions of this title and that all required improvements have been completed or that arrangements or contracts have been entered into to guarantee that such required improvements will be completed, and that the interests of the city are fully protected, the city council shall approve and the mayor shall sign the final plat and accept dedications as may be included thereon.

d. YMC 16.12.330, further provides:

A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision. . . A final plat shall vest the lots within such plat with a right to hook up to sewer and water for a period of five years after the date of recording of the final plat.

2. Petitioner first asserts that Yelm may not delay proof of a potable water supply until issuance of building permits. Second, Petitioner asserts that Yelm must demonstrate the existence of appropriate provision for potable water necessary to serve the proposed developments at the time of final plat approval through evidence of Ecology approved water rights.

3. Preliminary plat approval can be conditioned on the applicant resolving identified issues before final plat approval. 17 Stoebuck and Weaver, Real Estate: Property Law, Washington Practice Series, p.282 (2004). However, RCW 58.17.110 prohibits approval of a proposed subdivision unless written findings are made that"[a]ppropriate provisions are

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made for ... potable water supplies." Therefore, all requirements must be met and confirmed in written findings before final approval pursuant to RCW 58.17.110. The law is clear that these conditions, including the provision of a potable water supply, must be met before the building permit stage. Thus, the hearing examiner's condition, as written and as adopted by the Yelm City Council, is an erroneous interpretation of the law.

4. The parties have agreed that it is appropriate to amend the language of the Hearing Examiner's condition by removing the word "/or" to make clear that proof of adequate potable water must be made at the time of final plat approval and may not be deferred to the time of building permit approval. The insertion of the word "also" is consistent with the Yelm's argument before the Court that proof of potable water must be provided at both final plat approval and building permit approval. Such a resolution is consistent with the law.

5. RCW 58.17.110 and YMC 16.12.170 make clear that Yelm must make findings of "appropriate provisions" for potable water supplies by the time of final plat approval. Based upon the present record and this Court's interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. A finding of "reasonable expectation" of potable water based upon Yelm's historical provision of potable water would be insufficient to satisfy this requirement.

6. Yelm has argued that final plat approvals of the subdivisions in this matter are not expected in the near future. It is therefore possible that at the time of final subdivision approvals the facts and the law that will bear upon Yelm's ability to demonstrate the existence of "appropriate provisions" for potable water to serve these subdivisions may have changed. Accordingly, it is appropriate to defer the determination of "appropriate provision" until the time of final subdivision approval for each of the five subdivisions.

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7. Petitioner holds water rights that are subject to impairment in the event Yelm should continue to use water in excess of its Ecology approved water rights. Accordingly, Petitioner is entitled to written notice pertaining to final subdivision approval of the five proposed subdivisions, including: (1) written notice of any application for final subdivision approval of any of the five subdivisions within five business days of Yelm's receipt of such application; (2) ~~thirty~~ seven calendar days written notice and an opportunity to comment upon any proposed findings by Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final subdivision approval for those five subdivisions; and, (3) ~~thirty~~ seven calendar days written notice of any City Council hearing to consider final subdivision approval for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and written testimony ~~at any such~~ if a public is held hearing before the Yelm City Council on any of the five final subdivisions. Finally, Petitioner may seek judicial review ~~by this Court~~ of any decision by Yelm pertaining to final plat approval of any of the five subdivisions ~~as she deems necessary.~~

DATED this 7 day of November, 2008.

JUDGE CHRIS WICKHAM

Presented by:

GORDONDERR LLP

By: _____
Keith E. Moxon, WSBA#15361
Dale N. Johnson, WSBA #26629
Attorneys for JZ Knight

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APPENDIX K

3

FILED
SUPERIOR COURT
THURSTON

'08 NOV -7 P2:05

BY _____ DEPUTY

☐ EXPEDITE
☐ No hearing set
➢ Hearing is set
Date: November 7, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

J Z KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

JUDGMENT FOR PETITIONER JZ KNIGHT

[[redacted]]

THIS MATTER came before the Court on the petition of Petitioner JZ Knight pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA"). Petitioner challenges the City of Yelm's decision (Resolution No. 481, adopted February 12, 2008) approving five proposed subdivisions: SUB-05-0755-YL & PRD-05-0756-YL (Windshadow I); SUB-05-07-0128-YL & PRD 07-0129-YL (Windshadow II); BSP-07-0094 (Wyndstone); BSP-07-0097-YL & PRD-07-0098-YL (Berry Valley I); SUB-07-0187-YL (Tahoma Terra Phase II, Division 5 & 6).

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RL

The Court received the evidence contained in the record, considered the pleadings filed in the action and heard the oral argument of the parties' counsel at a hearing on October 1, 2008. On October 7, 2008, the court rendered a letter opinion in favor of the Petitioner JZ Knight, granting her land use petition. The Court made findings of fact and conclusions of law on November 7, 2008, which were entered on the same date. A copy of the findings of fact and conclusions of law are attached as **Exhibit A**.

Consistent with the Court's findings of fact and conclusions of law, final judgment is entered in this matter as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Petitioner's LUPA petition is GRANTED.

2. The decision by the Yelm City Council on February 12, 2008, is reversed and this matter is remanded to the Yelm City Council with instruction that each of the five preliminary subdivision approvals issued by the City of Yelm on February 12, 2008, shall be modified as follows:

The condition of preliminary plat approval contained in the Hearing Examiner's Decisions on Reconsideration dated December 7, 2007, and incorporated into the Yelm City Council's decision dated February 12, 2008, shall be modified by striking the word "/or" and inserting the word "also" as follows:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and~~/or~~ **also** prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC [Yelm Municipal Code].

3. Yelm shall provide written notice to Petitioner pertaining to final subdivision approval of the five proposed subdivisions as follows:

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a. Yelm shall provide written notice to Petitioner of any application for final subdivision approval of any of the five subdivisions within five business days of Yelm's receipt of such application. This will provide Petitioner

b. Yelm shall provide Petitioner ~~thirty~~ seven calendar days written notice and an opportunity to comment to city staff upon any proposed findings by Yelm pertaining to the "appropriate provisions . . . for potable water supplies" for each of the five subdivisions prior to any final subdivision approval for those five subdivisions. Prior to the date the city staff report is submitted to the city council.

KBM

c. Yelm shall provide Petitioner ~~thirty~~ seven calendar days written notice of any City Council hearing to consider final subdivision approval for any of the five subdivisions. Petitioner shall have the opportunity to provide oral and written testimony ~~at any such~~ if a public hearing is held on any of the five final subdivisions.

CDD to Town

~~d. This Court retains jurisdiction over this matter. Petitioner may seek judicial review of any such decision by this Court as she deems necessary, following Yelm's action on any of the five subdivision approvals.~~

JZK as to Town

4. All parties shall bear their own costs and attorneys' fees.

DONE IN OPEN COURT this 7 day of November, 2008.

JUDGE CHRIS WICKHAM

Presented by:

GORDONDERR LLP

By: _____
Keith E. Moxon, WSBA #15361
Dale N. Johnson, WSBA #26629
Attorneys for JZ Knight

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APPENDIX L

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH
08 JUL -7 PM 3:32
BETTY J. GOULD CLERK
BY_____
DEPUTY

☐ EXPEDITE
☐ No hearing set
➢ Hearing is set
Date: April 18, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

JZ KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER: REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

DECLARATION OF JZ KNIGHT

ORIGINAL

JZ Knight declares under penalty of perjury of the Laws of the State of Washington as follows:

1. I am the Petitioner in the matter of *JZ Knight v. City of Yelm; Windshadow LLC; Elaine C. Horsak; Windshadow II Townhomes, LLC; Richard E. Slaughter; Regent*

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Mahan, LLC; Jack Long; Petra Engineering, LLC; Samantha Meadow LLC; and TTPH 3-8, LLC, Thurston County Superior Court Number 08-2-00489-6. This is an appeal under the Land Use Petition Act ("LUPA") of a land use decision issued by the City of Yelm on February 12, 2008, approving five proposed subdivisions.

2. I reside at 14507 Yelm Highway SE, Yelm, Washington 98597.

3. I have participated, through my personal representatives, in each of the public hearings pertaining to the City of Yelm's approval of the five proposed subdivisions that are the subject of this LUPA appeal - Windshadow I, Windshadow II, Wyndstone, Berry Valley I, and Tahoma Terra Phase II, Divisions 5 & 6. I, or my representatives, have submitted written comments and oral testimony at each of the public hearings for these proposed subdivisions, including five separate public hearings before the City of Yelm Hearing Examiner in July of 2007 and a public hearing before the Yelm City Council in January of 2008.

4. Although my residence is in unincorporated Thurston County, my residence is within the City of Yelm Urban Growth Area (UGA). In addition, I own undeveloped property in the City of Yelm. The City of Yelm has recently approved five subdivisions totaling 568 units of residential development. The proposed subdivisions are located approximately 1,300 feet south of my property as reflected in the aerial photo attached as **Exhibit A** to my declaration.

5. I have an interest in the future development of my property and neighboring property, as well as an interest in obtaining future water connections to the City of

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Yelm's municipal water system. I have reviewed City of Yelm and Department of Ecology documents showing that the City of Yelm has been exceeding its water rights since 2005. I have knowledge of subdivisions and other development approvals issued by the City of Yelm since 2005 that are in excess of the City's current and projected water rights. As a result, I believe that the City's approval of the five subdivisions at issue in this case will result in new water demand in excess of the City's current and projected water rights. The result will be a continuation of the City's current practice of pumping water in excess of its water rights, which means the City will be using water without prior approval of additional water rights. This practice adversely affects my senior water rights, which would be protected Department of Ecology's water rights approval process if the City were required to have approved water rights before issuing final subdivision approvals..

6. The property I own within the City of Yelm's Urban Growth Area (which includes my residence) is within a quarter mile north of the five proposed subdivisions. I have significant water rights approved by the Department of Ecology for this property. I own and operate a domestic water system within the Nisqually River basin. My water system operates under water right certificate No. 5886 (a true and correct copy of which is attached to my declaration as Exhibit B). This right authorizes 160 gpm for 26 afy to provide potable water supply from the aquifers underlying my property for domestic use. The right also authorizes 9 afy for irrigation. This water right has a priority date of July 21st, 1964.

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7. I also own a surface water right from Thompson Creek that traverses my property (Water Right Certificate No. 7053, a true and correct copy of which is attached to my declaration as **Exhibit C**). This water right has a priority date of April 19, 1950. This surface water right is for .3 cubic feet per second (CFS) which is equivalent to approximately 150 gallons per minute (gpm), and 90 acre feet per year (afy). It has been difficult to exercise this right fully in recent years because Thompson Creek has been going dry as the City of Yelm has grown and as the City's water demand from the aquifer has increased.

8. My water rights are constitutionally protected and administered under a permit system implemented by the Department of Ecology. The DOE permit process allows me to participate in the necessary investigation and determination when the City of Yelm or other parties seek additional water rights. This includes and investigation and determination of water availability, impairment to other water rights and the public interest.

9. My property rights and interests, including my water rights, will be harmed if the City of Yelm's approval of these five subdivisions is allowed to stand. Unless the court intervenes, the City's approval of these five subdivisions will result in new water demand and use without additional water rights, which is a direct violation of my property rights under the water code, including the right to protect my water use from impairment.

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10. I am an existing water rights holder, and my water rights have a priority over all new water rights, all water rights issued after the priority date of my water rights, and all new impacts caused by the transfer of existing water rights. Therefore, I have a protected interest in the aquifer and the surface waters of Thompson Creek.

11. I rely upon a dependable and adequate supply of water for my residence and business interests on my property. The water demand from the five proposed subdivisions will require water withdrawal from the aquifer serving my property. If the City of Yelm is allowed to approve the developments at issue in this case without adequate legal water rights and without regard for my superior water rights, I risk being denied a dependable and adequate supply of water. If the City of Yelm uses or even makes a commitment of water to developers and future homeowners prior to obtaining a water rights approval from the State, my existing water rights are harmed. As one who relies on that same water source for authorized and permitted domestic use, my rights to have the permit system implemented for my protection will be directly harmed by the City's use of water without Ecology approval.

Dated this 3 day of July, 2008.

Respectfully submitted,

By: JZ Knight

Petitioner JZ Knight

GordonDerr

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Exhibit A

0-000000605

EXHIBIT B

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
AMENDED REPORT OF EXAMINATION FOR CHANGE
TO APPROPRIATE PUBLIC WATERS OF THE STATE OF WASHINGTON

☐ Surface Water

☒ Ground Water

PRIORITY DATE	APPLICATION NUMBER	PERMIT NUMBER	CERTIFICATE NUMBER
July 21, 1964	7267	6773	5866

NAME
JZK, Inc/J.Z. Knight

ADDRESS (NUMBER)	(CITY)	(STATE)	(ZIP CODE)
14507 Yelm Highway	Yelm	Washington	98558

PUBLIC WATERS TO BE APPROPRIATED

SOURCE
Well 1-Tag AGP181
Well 2-Tag AGP189
Well 3-Tag AGP177
Well 4-Tag AGP182
Well 5-Tag AGP183
Well 6-Tag AGP188

TRIBUTARY OF (IF WITHDRAWAL WITHIN)

MAXIMUM RATE, FEET PER SECOND	MAXIMUM QUANTITY, GALLONS PER MINUTE	MAXIMUM ACRE-FEET PER YEAR
	160	26.02 ac-ft Multiple Domestic Supply; 9.15 ac-ft is reserved for irrigation of 5 acres

QUANTITY, TYPE OF USE, PERIOD OF USE
26.02 ac-ft Multiple Domestic Supply Year-round, as needed
Reservation of 9.15 ac-ft per year for irrigation of 5 acres, including 0.92 ac-ft of return flows for 5 acres of irrigation

LOCATION OF DIVERSION/WITHDRAWAL

APPROXIMATE LOCATION OF DIVERSION/WITHDRAWAL
Well 1: SW ¼ SW ¼ Section 13
Well 2: SW ¼ SW ¼ Section 13
Well 3: SW ¼ SW ¼ Section 13
Well 4: SE ¼ SE ¼ Section 14
Well 5: SE ¼ SE ¼ Section 14
Well 6: NW ¼ SE ¼ Section 14

LOCATED WITHIN (SMALLEST LEGAL SUBDIVISION)	SECTION	TOWNSHIP N	RANGE E OR W	W.R.I.A.	COUNTY
SW¼ SE¼	13 14	17	1E	11	Thurston

RECORDED PLATTED PROPERTY

LOT	BLOCK	OF (GIVE NAME OF PLAT OR ADDITION)

LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS TO BE USED

The place of use (POU) of this water right is the area owned by JZKnight and JZK, Inc. in the SW ¼ of Section 13, parcels 75201300000, 75201100000, 75200200203, 75200200202, 75200200200, 75200200201, 75200200400, 75200200500, 75200200300, 75200200000, 75200100100, 75200100000, 21714430100; and SE ¼ of Section 14 westerly of Highway 510 (Yelm Highway), within T17N, R1E

If you require this publication in an alternate format, please contact Water Resources at (360) 407-6300, or TTY (for the speech or hearing impaired) 711 or 800-833-6388.

REPORT OF EXAMINATION

DESCRIPTION OF PROPOSED WORKS

6 wells with individual distribution systems. Water is not combined or commingled.

DEVELOPMENT SCHEDULE

BEGIN PROJECT BY THIS DATE	COMPLETE PROJECT BY THIS DATE	WATER PUT TO FULL USE BY THIS DATE
December 1, 2007	December 1, 2011	December 1, 2013

REPORT

PROVISIONS:

"Under all wells authorized by this certificate, instantaneous withdrawals must be managed so as not to exceed 160 gpm."

"This permit authorizes a total of 36.02 ac-ft per year, reserving 9.15 ac-ft per year for irrigation of 5 acres. The water duty assumes an irrigation efficiency of 75% with 15% evapotranspirative losses and assumes irrigation season flows of 0.92 ac-ft per year for irrigation of 5 acres. Up to 16.87 ac-ft per year can be used for domestic use which can include irrigation in addition to the 5 acres specified."

The water appropriated under this application will be used for public water supply. The State Board of Health rules require public water supply owners to obtain written approval from the Office of Water Supply, Department of Health, 1112 SE Quince Street, PO Box 47890, Olympia, Washington 98504-7890, prior to any new construction or alterations of a public water supply system.

An approved measuring device shall be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use", Chapter 173-173 WAC.

Water use data shall be recorded annually and maintained by the property owner for a minimum of five years, and shall be promptly submitted to Ecology upon request.

The following information shall be included with each submittal of water use data: owner, contact name if different, mailing address, *daytime phone number*, WRIA, *Permit/Certificate/Claim No., source name, annual quantity used including units, maximum rate of* diversion including units, monthly meter readings including units, monthly meter readings including units, peak monthly flow including units, Department of Health WFI water system number and source number(s), purpose of use, well tag number and period of use. In the future, Ecology may require additional parameters to be reported or more frequent reporting. Ecology prefers web based data entry, but does accept hard copies. Ecology will provide forms and electronic data entry information

Chapter 173-173 WAC describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition Ecology for modifications to some of the requirements. Installation, operation and maintenance requirements are enclosed as a document entitled "Water Measurement Device Installation and Operation Requirements".

In order to help protect your water right from potential future impairment by junior water users, it is important that a record be established of accurate water-level measurements for your well. As such, it is recommended that you measure and record the water level in your well quarterly, using a consistent methodology. This information will be most useful if these measurements are taken after your well has returned to a static (recovered aquifer) condition. In the absence of this, then next best option is to maintain consistency regarding the length of the pumping and recovery period prior to each measurement. For maximum usefulness, data collected should include the following elements:

1. Unique Well ID Number (If available)
2. Description of the measuring point (top of casing, sounding tube, etc.)
3. Measuring point elevation above or below land surface to the nearest 0.1 foot
4. Land surface elevation at the well head to the nearest foot
5. Measurement date and time
6. Measurement method (*air line*, electric tape, *pressure transducer*, etc.)
7. Well status (pumping, recently pumped, etc.)
8. Water level accuracy (to nearest foot, tenth of foot, etc.)
9. Depth to static water level below measuring point to the nearest 0.1 foot.

The first four items listed should remain constant from one measurement to the next.

Department of Ecology personnel, upon presentation of proper credentials, shall have access at reasonable times, to the records of water use that are kept to meet the above conditions, and to inspect at reasonable times any measuring device used to meet the above conditions.

The Water Resources Act of 1971 specifies certain criteria regarding utilization and management of the waters of the state in the best public interest. Use of water may be subject to regulation at certain times, based on the necessity to maintain water quantities sufficient for preservation of the natural environment.

based on the necessity to maintain water quantities sufficient for preservation of the natural environment.

REPORTED BY: _____ Date: 6/25/07

FINDINGS OF FACT AND DECISION

Upon reviewing the above report, I find all facts, relevant and material to the requested Application for Change have been thoroughly investigated. Furthermore, I find water is available for appropriation and the appropriation as recommended is a beneficial use and will not be detrimental to existing rights or the public welfare.

Therefore, I ORDER a superseding certificate be issued under Water Right Number 5866, subject to existing rights and subject to provisions, to allow appropriation of public water for the amount and uses specified in the foregoing report.

Signed at Olympia, Washington, this 28th day of June, 2007.

Thomas Loranger
Water Resources Section Manager
Southwest Regional Office

EXHIBIT C

CERTIFICATE RECORD NO. 15, PAGE NO. 7033

STATE OF WASHINGTON, COUNTY OF Thurston

CERTIFICATE OF SURFACE WATER RIGHT

(In accordance with the provisions of Chapter 117, Laws of Washington for 1917, and amendments thereto, and the rules and regulations of the State Supervisor of Water Resources thereunder.)

This is to certify that H. J. VAN BEEK

of Yelm, State of Washington, has made proof to the satisfaction of the State Supervisor of Water Resources of Washington, of a right to the use of the waters of Thompson Creek, a tributary of Mcpolly River, with point or points of diversion within the SWNE¼ Sec. 14, Twp. 17 N., R. 1 E., W. M., under and subject to provisions contained in Appropriation Permit No. 6797 issued by the State Supervisor of Water Resources, and that said right to the use of said waters has been perfected in accordance with the laws of Washington, and is hereby confirmed by the State Supervisor of Water Resources of Washington and entered of record in Volume 15, at Page 7033, on the 23rd day of December, 19 57.

that the priority date of the right hereby confirmed is April 19, 1950; that the amount of water under the right hereby confirmed, for the following purposes is limited to an amount actually beneficially used and shall not exceed 0.30 of a cubic foot per second, 90 acre-feet per year, for the purpose of the irrigation of 45 acres.

A description of the lands under such right to which the water right is appurtenant, and the place where such water is put to beneficial use, is as follows:

The S½NE¼ of sec.14, T.17N., R.1 E.W.M., and that part of the SE¼NW¼, sec.13, T.17N., R.1 E.W.M., lying southerly of Secondary State Highway No. 5-A; EXCEPTING THEREFROM the south 496.9d feet.

The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place of use herein described, except as provided in Sections 6 and 7, Chapter 122, Laws of 1929.

WITNESS the seal and signature of the State Supervisor of Water Resources affixed this 23rd day of December, 19 57.

CHECKED BY

O.K.

State Supervisor of Water Resources.

Triplicate maps of the proposed ditch or other work, prepared in accordance with the rules of the State Supervisor of Hydraulics, accompany this application.

(SIGN HERE) Clement A. Palmer
(Signature of applicant)

Signed in the presence of us as witnesses:

(1) M. Matthews
(Name) (Address of witness)

(2) (Name) (Address of witness)

Remarks:

STATE OF WASHINGTON, } ss.
COUNTY OF THURSTON. }

This is to certify that I have examined the foregoing application together with the accompanying maps and data, and return the same for correction or completion, as follows:

In order to retain its priority, this application must be returned to the State Supervisor of Hydraulics, with corrections, on or before..... 19....

WITNESS my hand this.....day of..... 19....

State Supervisor of Hydraulics.

APPENDIX M

15

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
08 JUL -7 PM 3:32
BETTY J. GOULD, CLERK
BY _____ DEPUTY

☐ EXPEDITE
☐ No hearing set
➢ Hearing is set
Date: July 18, 2008
Time: 9:00 a.m.
Judge/Calendar: Chris Wickham

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

JZ KNIGHT,

Petitioner,

v.

CITY OF YELM; WINDSHADOW LLC; ELAINE C. HORSAK; WINDSHADOW II TOWNHOMES, LLC; RICHARD E. SLAUGHTER; REGENT MAHAN, LLC; JACK LONG; PETRA ENGINEERING, LLC; SAMANTHA MEADOWS LLC; TTPH 3-8, LLC,

Respondents.

No. 08-2-00489-6

DECLARATION OF ERICK W. MILLER

ORIGINAL

Erick W. Miller declares under penalty of perjury of the Laws of the State of Washington as follows:

1. I am a senior associate hydrologist for Aspect Consulting, LLC. I hold a Master of Science degree in Earth Sciences from Montana State University and a Bachelor of Science Degree in Geology from the University of Rhode Island. I am a licensed hydrogeologist and engineering geologist in the State of Washington. A copy of my

GordonDerr
2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

0-000000585

Curriculum Vitae is attached to my declaration as **Exhibit A.** I have over 20 years' experience in hydrogeology, including groundwater development and resource management watershed studies, water rights permitting, groundwater resource development, well siting design and testing and land-use water related water quality impacts. My current practice focuses on water rights permitting, water resource science, and water supply management.

2. I am familiar with the hydrogeology of the Yelm Prairie upland, including the JZ Knight's property located on the western side of the Yelm Prairie. I recently conducted a hydrogeologic assessment of JZ Knight's property and the surrounding area. My findings and conclusions pertaining to that assessment are contained in a memorandum dated July 3, 2008, true and correct copy of which is attached to my Declaration as **Exhibit B.**

3. As part of my hydrogeologic assessment of JZ Knight's property and the surrounding area, I have reviewed the references and attachments listed in the memorandum (**Exhibit B**).

4. As set forth in detail in **Exhibit B** to my declaration, based on my understanding of hydrogeological conditions in the study area, the City of Yelm's withdrawal of potable water from its existing wells and/or the withdrawal of groundwater from a well on the Tahoma Valley Golf Course location is expected to adversely impact JZ Knight's wells and adversely impact the instream flow of Thompson Creek.

Dated this 3rd day of July, 2008.

Respectfully submitted,

By: Erick W. Miller

Erick W. Miller LHG, LEG

GordonDerr

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

Aspect consulting earth+water

MASTER RESUME

ERICK W. MILLER, LHG, LEG | Senior Associate Hydrogeologist

EDUCATION
MS, Earth Sciences, Montana State University, 1987
BS, Geology, University of Rhode Island, 1980

PROFESSIONAL REGISTRATIONS AND CERTIFICATIONS
Licensed Hydrogeologist, WA
Registered Hydrogeologist, CA
Licensed Engineering Geologist, WA

With over 20 years' experience in groundwater development and resource management, Erick Miller is a recognized Washington State expert with an active and growing practice in water rights permitting, water resource science, and water supply management. His experience encompasses the many facets of hydrogeology including watershed studies, water rights permitting, groundwater resource development, well siting design and testing and land-use related water quality impacts. He has developed and implemented monitoring programs for new water rights and water right transfers, including monitoring for impacts to adjacent surface water bodies, impacts to nearby wells, and salt water intrusion. His expertise in watershed assessments has included development of conceptual hydrogeologic models and detailed basin water budget analyses. He served as an expert for the Department of Justice during the Lummi Peninsula water rights adjudication, and is currently assisting in the evaluation of the Twin Lakes Aquifer Coalition (TLAC) water right application evaluation in the Methow Valley.

Lummi Peninsula Ground Water Investigation, Whatcom County, WA

Hydrogeologist and expert witness for a multi-year ground water investigation of the Lummi Peninsula in support of water rights adjudication for the US Bureau of Indian Affairs and Department of Justice. Established climate stations for monitoring computation of reference evapotranspiration, established 10 stream gauging stations, sited test wells, and performed detailed geologic mapping through coastal exposures and Carbon-14 dating, test pits and existing subsurface borings. Analyzed data including development of recharge estimates through an area specific water balance. During litigation phase of the project served as expert witness on behalf of Department of Justice.

City of Tumwater Wellfield Investigation, Tumwater, WA

Project manager of a ground water resource investigation for the City of Tumwater. In addition to water rights support, Erick provided evaluation of the region's aquifer potential, and test well siting. He made preliminary assessment of hydraulic continuity and contaminant vulnerability issues during well siting process.

Evaluation of Water Right Transfer for Artificial Recharge, Methow Valley, WA

Erick is currently providing hydrogeologic support for a phased assessment related to processing of the Twin Lakes Aquifer Coalition's (TLAC) water right application to divert Methow River water and convey it to a lake lower in the basin, from which the added water would recharge the underlying aquifer system. Since there are more than 150 pending water right applications in the watershed that are competing for the same source of water, Aspect's Phase 1 assessment identified the subset of applications requiring processing prior to TLAC's; and identified criteria and a methodology for processing all of the applications. We then conducted subsequent hydrogeologic evaluations to assess whether the TLAC application meets the criteria for expedited processing under the Hillis Rule (water-balance neutral and substantial environmental benefit). Erick developed a conceptual model of the area including assessment of groundwater/surface water interactions and assisted in development of a 3-D groundwater model to assess drawdown in the vicinity of the proposed wells, the quantity of water required to fill Big Twin Lake under two pumping schedules, and the monthly effects on flows in the Methow River. Ongoing work includes collection of additional water level data and gaging Thompson Creek streamflow a for the purposes of refining aquifer recharge through stream losses.

Bainbridge Island Groundwater Management Program, Bainbridge Island, WA

Erick has been Aspect's project manager working with the City of Bainbridge Island in the development of a groundwater management plan for the island and ongoing support. He oversaw Aspect's two primary tasks: the establishment of an effective monitoring well network and the implementation of a user-friendly database. Since the development of the program, Erick has been overseeing ongoing database support and water level monitoring.

Clallam County PUD Deer Park Road Well, Clallam County, WA
Project Manager for conceptual/numerical hydrogeologic model and an assessment of effects of the proposed water right change on surface and groundwater.

Graysmarsh Hydrogeologic Investigation, Graysmarsh LLC, Sequim, WA
Project manager for a comprehensive hydrogeologic investigation for an approximate 1.5-square-mile privately owned marsh/agricultural complex located in Sequim, Washington. The City of Sequim relocated their wellfield from a location adjacent to the Dungeness River where it was in direct hydraulic continuity, to a location in the Gieren Creek basin. Graysmarsh was concerned over impacts from the well relocation of the wellfield and from measures to line leaking irrigation ditches that recharge the shallow aquifer. An intensive stream gauging effort was implemented including gauging of the tidally influenced marsh to evaluate the relationship between surface water in recharge areas (irrigation ditches), ground water, and surface water in discharge areas (Gierin Creek). Aspect Consulting developed appropriate methods for gauging at 13 surface water locations and selected wells on the property. Impacts of the wellfield on the marsh were determined analytically. Worked closely with Graysmarsh fisheries biologist to determine areas that were more sensitive to reduced flow and required more detailed gauging. In a follow-up phase, the zone of ground water contribution to the marsh and Geirin Creek was defined in detail through water level measurements in approximately 50 private wells. Seepage surveys were made within irrigation ditches located in the marsh zone of groundwater contribution to evaluate their leakage and the impact lining them will have on shallow ground water discharge into Gierin Creek.

Duck Valley Indian Reservation, Bureau of Indian Affairs, ID-NV
Performed as part of the Snake River water rights adjudication, Erick provided technical oversight of a MODFLOW model to demonstrate the ability of an extensive alluvial aquifer to act as a storage reservoir. The project entailed canal seepage monitoring, instrumentation of wells for long-term monitoring and development of estimate of mountain front recharge.

Nez Perce Indian Reservation Water Rights Adjudication, Western ID
Erick was the federal government's expert witness for ground water issues related to the Nez Perce Indian Reservation in Idaho. The project included analysis of aquifers in the Columbia River Basalt and other geologic units within the reservation to support future agricultural, domestic, and municipal supply needs.

City of Tumwater Wellfield Investigation, Tumwater, WA
Project manager of a ground water resource investigation for the City of Tumwater. In addition to water rights support, Erick provided evaluation of the region's aquifer potential, and test well siting. He made preliminary assessment of hydraulic continuity and contaminant vulnerability issues during well siting process.

Whitehorse Fish Hatchery, Snohomish County, WA
Erick served as project manager for development of a new water supply to support rearing of summer run Chinook. He worked with Ecology and DFW to obtain approval for preliminary permit to support a new, nonconsumptive water right of 2 cfs for fish propagation at the hatchery on the North Fork of the Stillaguamish River. Erick led Aspect staff in performing a well siting study and reviewing hydraulic continuity of the target aquifer and the North Fork. He completed a water right application, met with Ecology to review the application, and discussed proposed withdrawals and mitigation strategies and gain approval for the test well permit. He developed driller's technical specifications, and provided oversight of geologic monitoring and well design and testing services for Fish and Wildlife.

WRIA 16 Hydrogeologic Study, Brinnon, WA
Project manager of a detailed Level 2 Assessment of the groundwater-surface water interaction along the lower Dosewallips River, near Hood Canal. The study is in response to WRIA 16 Planning Unit concerns over growth in the area and future impacts to Dosewallips River instream flows as a result of withdrawing groundwater which would otherwise discharge into the river. The study evaluates the importance of groundwater discharge for maintaining summer low flows critical to maximizing the area available to spawning summer run Chum, and later in the season for maintaining water flow over the redds. Erick developed the project scope which includes detailed mapping of hydrostratigraphy and groundwater flow patterns in alluvial and basalt aquifers; assessing geochemical signatures (major ions, deuterium, and oxygen 18) of groundwater in alluvial and basalt aquifers, relative to river); and seepage surveys, installation of minipiezometers and temperature loggers to evaluate gaining and losing reaches of the river.

EXHIBIT B

Aspect consulting
earth+water

MEMORANDUM

Project No.: 080130-001-02

July 3, 2008

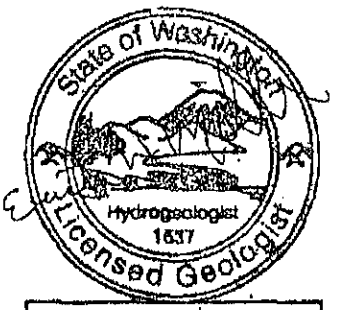
To: JZ Knight

cc: Keith Moxon, GordonDerr LLP
Tom McDonald, Cascadia Law Group

From: **Tyson D. Carlson, LHG**
Senior Project Hydrogeologist

Erick W. Miller, LHG
Senior Associate Hydrogeologist

Re: **JZ Knight Hydrogeologic Assessment**
Yelm Prairie Area, Washington



Erick W. Miller
7-03-08

The City of Yelm (City) has recently approved five subdivisions totaling 568 units of residential development. These subdivisions are the subject of an appeal under the Land Use Petition Act ("LUPA") in Thurston County Superior Court. The City of Yelm has stated that it is pursuing new groundwater rights to supply potable water to these and other development projects in the City of Yelm. The proposed subdivisions are located approximately 1,300 feet south of the JZ Knight property (Figure 1). This memorandum addresses the impact of additional groundwater withdrawals from City wells to serve these five subdivisions. In particular, the impact considered is the impact to groundwater and surface water for which JZ Knight has water rights approved by the Washington Department of Ecology. This impact is determined by evaluating the hydraulic connection between the City of Yelm's wells (the source of groundwater to supply the five proposed subdivisions) and the groundwater and surface water resources for which JZ Knight has water rights.

JZ Knight's property is located on the western side of the Yelm Prairie, approximately 1.2 miles from downtown Yelm (intersection of SR 510 and SR 507), as illustrated on Figure 1. Six water supply wells are located on the JZ Knight property. JZ Knight has surface water rights to Thompson Creek, a tributary of the Nisqually River. Thompson Creek traverses the Knight property from south to north. The 568 residential units proposed in the five subdivisions approved by the City of Yelm would require 191 acre-feet per year (afy) of additional potable water, based on the City's Comprehensive Plan standard of 300 gallons per day per connection "for planning and concurrency purposes" (City of Yelm, Comprehensive Plan, p. V-3, 2006).

Information on the future water supply alternatives being considered by the City of Yelm is documented in several reports, including a January 29, 2008 report entitled "Groundwater Modeling of New Water Right and Transfer Applications" prepared by Golder Associates.

That report quantifies the impacts of water supply alternatives on local groundwater elevations and regional surface water features. Additional information regarding future water resource, geological, and hydrogeological issues is contained in the Draft Environmental Impact Statement ("DEIS") (City of Yelm, 2008) completed for the Thurston Highlands Master Planned Community. Thurston Highlands is a proposed development on approximately 1,240 acres located in the southwest corner of the City of Yelm Urban Growth Area ("UGA") (see Figure 1).

Based on these documents and other references cited in this technical memorandum, we have developed an understanding of the City's strategies for developing water supply alternatives to meet future demand. These strategies all assume that the City will face a significant increase in water demand and that the City will be required to acquire substantial new supplies of water to serve this increased demand. The proposed 568 units of residential development is part of the significant increase in water demand that the City will have to serve. The City is actively considering the acquisition of new water rights for the SW well-field within the Thurston Highlands Master Planned Community that would total 3,037.88 afy. However, there is no evidence that these water rights will be available in time to serve the five proposed subdivisions. Therefore, this technical memo evaluates the impact of serving the five proposed subdivisions (191 afy) using the City's existing wells, including any additional wells located on the Tahoma Valley Golf and Country Club that may be available pursuant to a recent water right approval of 77 afy.

Background

The following section presents our understanding of the regional hydrogeology based on the review of the background materials cited in this technical memorandum. This discussion is supported by the cross section presented in Figure 2. The cross section location is presented on Figure 1.

Regional Hydrogeology

The hydrogeology of the Yelm Prairie upland is defined by four major water bearing stratigraphic units. The Vashon Drift, with its characteristic large thicknesses of stratified sand and gravel, gives rise to the uppermost aquifer in the *recessional outwash (Qvr)* deposits. The Qvr aquifer supports numerous shallow water table lakes and wetlands, and contributes perennial base flow to creeks and rivers. End moraine deposits of the recessional outwash are included with the Qvr unit. Below Qvr, low permeable Vashon *till (Qvt)* often separates the upper recessional and the underlying advance outwash aquifers. The *advance outwash (Qva)* serves as a significant source of potable water for some municipal and exempt water supply wells. The Qva is often hydraulically confined by the overlying low-permeability Qvt. Few water supply wells are completed in the Qvr due to its limited thickness and the susceptibility to water quality problems. However, the Qva is a significant source of potable water in Thurston County. The City of Yelm's three existing wells are located in the Qva unit.

Below the Vashon Drift sequence are the clay and silts of the interglacial Kitsap formation. This unit typically acts as a regional aquitard, separating the shallow aquifers from the more

regionally extensive deeper aquifers. From our review of well logs, it appears that the Kitsap Formation is thin or absent throughout much of the area of the City's existing wells and the wells on the JZ Knight property.

Underlying the Vashon Drift in the area of the City's existing wells and the wells on the JZ Knight property are deposits from the *"penultimate" glaciation (Qc)*, or more regionally identified as the Salmon Springs Drift, which is present throughout most of the region. The Qc aquifer is typically 15 to 70 feet thick, but has been observed to be in excess of 200 feet thick. The coarse-grained layers within the Qc are a heavily utilized water bearing unit. JZ Knight's wells are completed within the Qva or Qc units.

The deepest known major water bearing unit in this area is the *undifferentiated and unconsolidated Quaternary and Tertiary sedimentary units (Qu/TQu)*. Although highly heterogeneous, several different water bearing layers have been identified. The proposed SW wellfield described in the City's 2008 Golder report and the DEIS for Thurston Highlands is proposed to be developed in the Qu/TQu unit. Few wells penetrate the entire thickness of these unconsolidated deposits, so information on thickness or extent of deeper regional water bearing zones is limited.

Groundwater Flow

In the shallow Vashon aquifers (Qvr and Qva), groundwater flow directions generally correspond to surface topography, with groundwater divides located near ridgelines, and flow tending toward local saline or fresh water (e.g., upper Thompson Creek, Yelm Creek, and adjacent reaches of the Nisqually River) discharge boundaries. Drost, et al. (1999) mapped local groundwater gradients in the Qva as being north to northwest toward the Nisqually River (Figure 3).

Groundwater flow in the intermediate Qc aquifer exhibits similar flow patterns as the overlying Vashon aquifers, but the effect of local surface water drainages is muted. Drost, et al. (1999) concluded that deeper groundwater discharges principally to regional discharge features like the lower reaches of the Nisqually/McAllister River system and Puget Sound. However, similar to the Vashon aquifers, groundwater divides in the Qc aquifer are near topographic ridgelines, with flow directions toward the regional discharge features described above. An analogous flow pattern is observed in the deeper Qu aquifer. Locally, the groundwater flow in the Qc aquifer is in a northwesterly direction (Figure 4).

The aquifers are recharged by precipitation, streamflow losses, and vertical leakage from shallow units into deeper units. Because of this vertical leakage, Ecology considers surface water to be hydraulically connected and constitute the same source of public groundwater (THUR 07-08).

Thompson Creek

The headwaters of Thompson Creek begin south of the location of the five proposed subdivisions and south of the Tahoma Valley Golf and Country Club. Thompson Creek then drains across the western edge of the Yelm Prairie, through the JZ Knight property, and north

to the Nisqually River. The upper reaches of Thompson Creek are supported by shallow groundwater discharging to the creek. This area is also host to numerous delineated wetlands. Flow is intermittent between the wetland complexes of the upper reaches and Tahoma Terra Bridge with flow typically occurring from October through June. Highest baseflows and groundwater discharge to the creek occur in midwinter to early spring. Monitoring during winter 2008 approximately 100 feet downstream from the Tahoma Terra.Bridge indicates a baseflow condition of about 1.5 to 2 cubic feet per second (cfs) (Brown and Caldwell, 2008, p. 6).

Downstream of 93rd Avenue SE, the creek loses water most of the year as it traverses the more permeable outwash deposits (Qvr). This "losing stream" characteristic means that Thompson Creek recharges the underlying groundwater, but when there is not enough flow in Thompson Creek (due to various causes including withdrawal of groundwater from existing City wells), then less water is available for recharging the aquifer. The groundwater-surface water interaction is described in the DEIS for the Thurston Highlands project (Brown and Caldwell, 2008). Thompson Creek is a "losing" stream where it traverses the JZ Knight property. This leakage is a source of recharge to the Qva/Qc aquifer where the JZ Knight's wells are completed. Rongey/Associates (2001) estimated a flow loss from that portion of Thompson Creek between the south and north boundaries of the JZ Knight property as a flow loss to the underlying aquifer at a rate of 0.31 cfs in January 2001.

The Washington Department of Ecology has recognized the direct continuity between the upper reaches of Thompson Creek and the Qva aquifer. This hydraulic continuity was described in the Report of Examination transferring the Tahoma Valley Golf Course water right to the City of Yelm (THUR 07-08).

According to Golder's report concerning the development of the SW wellfield, Alternative D, which would concentrate the City's water rights into the City of Yelm's downtown wells and a new well at the Tahoma Valley Golf Course, is predicted to decrease Yelm Creek surface water flows by 0.28 cfs. Similar analysis was not available for the impacts to Thompson Creek under this alternative, but in our opinion similar impacts to Thompson Creek (i.e., decrease of surface water flows) would be expected. Moreover, the Golder study predicts water levels in the Yelm area will decline up to 1-foot as a result of increased pumping. A water level decline of 1-foot will extend the dry season for Thompson Creek and diminish the wetted reaches during periods of flow.

Minimum Instream Flows

Washington Administrative Code (WAC) Chapter 173-511 outlines an instream resources protection program and specifies minimum instream flows for the Nisqually River watershed. The City's wellfields and JZ Knight's wells are located in this watershed.

The Bypass and Middle Reaches of the mainstem Nisqually River are closed to further appropriation from June 1 to October 15. The JZ Knight property is located adjacent to the Bypass Reach and Diversion Channel. Instream flow regulations apply to Thompson Creek, which has an established instream low flow limit of 1.0 cfs.

The purpose of instream flow limits is to protect surface water bodies such as Thompson Creek. JZ Knight has surface water rights to Thompson Creek.

JZ Knight Property and Water Rights

There are six wells currently located on the JZ Knight property, which are permitted under Certificate No. 5866 for an instantaneous withdrawal rate (Qi) of 160 gallons per minute (gpm) and a cumulative annual volume (Qa) of 26.02 afy for multiple domestic supply and 9.15 afy for irrigation of 5 acres. Wells are located throughout the property, each with its own distribution system. Well 1 is currently authorized as a Group A water supply, while Wells 2 through 5 are used for domestic use, fire flow, and irrigation. Well 6 is the original point of withdrawal for Certificate 5866. The locations of the wells are illustrated on Figure 1 and in cross section on Figure 2.

According to the Amended Report of Examination for Change for Certificate 5866 and the geologic interpretation provided by Drost, et al. (1999), Ecology determined that Wells 1 through 5 are completed in lower portions of the Qva or the upper portions of the Qc (Ecology, 2007).

JZK owns a surface water right from Thompson Creek that traverses her property. Water Right Certificate No. 7053. The right is for 0.3 cfs which is equivalent to approximately 150 gpm, and 90 afy. This water right has a priority date of April 19, 1950.

Impact Analysis

Based on our understanding of hydrogeological conditions, the City of Yelm's withdrawal of potable water from its existing wells and/or the withdrawal of groundwater from a well on the Tahoma Valley Golf Course location are expected to adversely impact JZ Knight's wells and adversely impact the instream flow of Thompson Creek.

The City of Yelm's downtown wells lie hydraulically upgradient of JZ Knight's wells and are completed in the same aquifer system as the six JZ Knight's wells. Any additional groundwater withdrawn from the City wells is expected to adversely affect JZ Knight's ability to withdraw water from Thompson Creek and reduce the recharge flow ("leakage") from Thompson Creek to the aquifer. This recharge flow helps maintain aquifer levels and water levels in the JZ Knight wells.

Increased pumping from the City's downtown wells is expected to adversely impact flows in the upper reaches of Thompson Creek. Diminished flows in any section of Thompson Creek upgradient of the JZ Knight property will lead to diminished flow in Thompson Creek on the JZ Knight property and will also result in reduced recharge to the aquifer at the JZ Knight property. Gaging measurements by Rongey/Associates (2001) indicate that these stream losses are an important source of recharge to the aquifers beneath the JZ Knight property.

In addition to increased pumping in the City wells, Thompson Creek is expected to be further adversely impacted on the JZ Knight property by the establishment of an additional point of withdrawal on the Tahoma Valley Golf Course in the shallow Qva aquifer. This additional point of withdrawal would occur in connection with the proposed transfer of the McMonigle

water right (up to 172.96 afy) to that location and would be in addition to the pumping of the existing Tahoma Valley Golf and Country Club water right (up to 77 afy) recently transferred to the City. The existing McMonigle well is located approximately 2 miles from the City wells upgradient in the Yelm Creek drainage, while the Golf Course well is about 2,000 feet from Thomson Creek and 1,300 feet from wetlands adjacent to Thompson Creek. Transfer of this additional pumping closer to Thompson Creek will have an increased adverse impact on Thompson Creek flows. Thompson Creek flows would be expected to diminish with transfer of the McMonigle water right (172.96 afy) and the corresponding increase in groundwater pumping from the Golf Course wells.

Impacts to shallow aquifer levels and streamflows with increased withdrawals in the City's downtown and Golf Course wells are indicated by groundwater modeling done by Golder Associates (2008). The groundwater model indicates a decline in shallow aquifer water levels of up to 1-foot in the Yelm area. A 1-foot decline in water levels would adversely impact flows, particularly in Thompson Creek, where groundwater levels are already below the base of the stream during much of the year. Although Golder Associates (2008) did not quantify specific impacts to Thompson Creek, they did model results for Yelm Creek and indicated a 0.28 cfs decline in flows. Based on the Golder model and the similar hydrologic setting for Yelm and Thompson Creeks, declining flows are also expected to occur in Thompson Creek.

The direct adverse impact of additional groundwater withdrawal from City wells to that portion of Thompson Creek within the JZ Knight property will be: (1) the number of days that Thompson Creek meets instream flow limits is expected to be reduced, and (2) the extent of the dry reach of Thompson Creek on the JZ Knight property would be expected to increase. Both of these impacts are adverse to the ability of JZ Knight to use her water rights.

References

Brown and Caldwell, 2008, Thurston Highlands DEIS Surface Water Technical Report, May 13, 2008.

City of Yelm, 2006, Comprehensive Plan and Joint Plan with Thurston County, p. V-3.

City of Yelm, 2008, Thurston Highlands, Master Planned Community, Draft Environmental Impact Statement. June 2008.

Drost, B.W., Turney, G.L., Dion, N.P., and Jones, M.A., 1999, Conceptual Model and Numerical Simulation of the Ground-Water Flow System in the Unconsolidated Sediments of Thurston County, Washington. U.S. Geological Survey Water Resources Investigation Report 99-4165, 1999.

Golder Associates, 2008, Groundwater Modeling of New Water Right and Transfer Applications, City of Yelm, Washington. Prepared for City of Yelm. January 29, 2008.

Rongey/Associates, 2001, Hydrogeologic Investigation, Yelm Prairie Area. Prepared for JZK, Inc. February 2001.

Skillings Connolly, 2002, City of Yelm Comprehensive Water Plan. Prepared for City of Yelm. September 2002.

THUR 07-08, Application for Change/Transfer, Report of Examination for 5155-A. Prepared by Thurston County Water Conservancy Board. January 28, 2008.

Washington State Department of Ecology (Ecology), 2007, Amended Report of Examination for Change, Certificate No. 5866. June 20, 2007.

Watershed Professionals Network (WPN), 2002, Nisqually River Level I Watershed Assessment (WRIA 11), Summary Report. Prepared for Nisqually Watershed Planning Group. July 2002.

Limitations

Work for this project was performed and this memo prepared in accordance with generally accepted professional practices for the nature and conditions of work completed in the same or similar localities, at the time the work was performed. It is intended for the exclusive use of JZ Knight for specific application to the referenced property. This memo does not represent a legal opinion. No other warranty, expressed or implied, is made.

Attachments

Figure 1 – Study Location
Figure 2 – Cross Section A-A'
Figure 3 – Qva Aquifer Groundwater Elevation Contours
Figure 4 – Qc Aquifer Groundwater Elevation Contours

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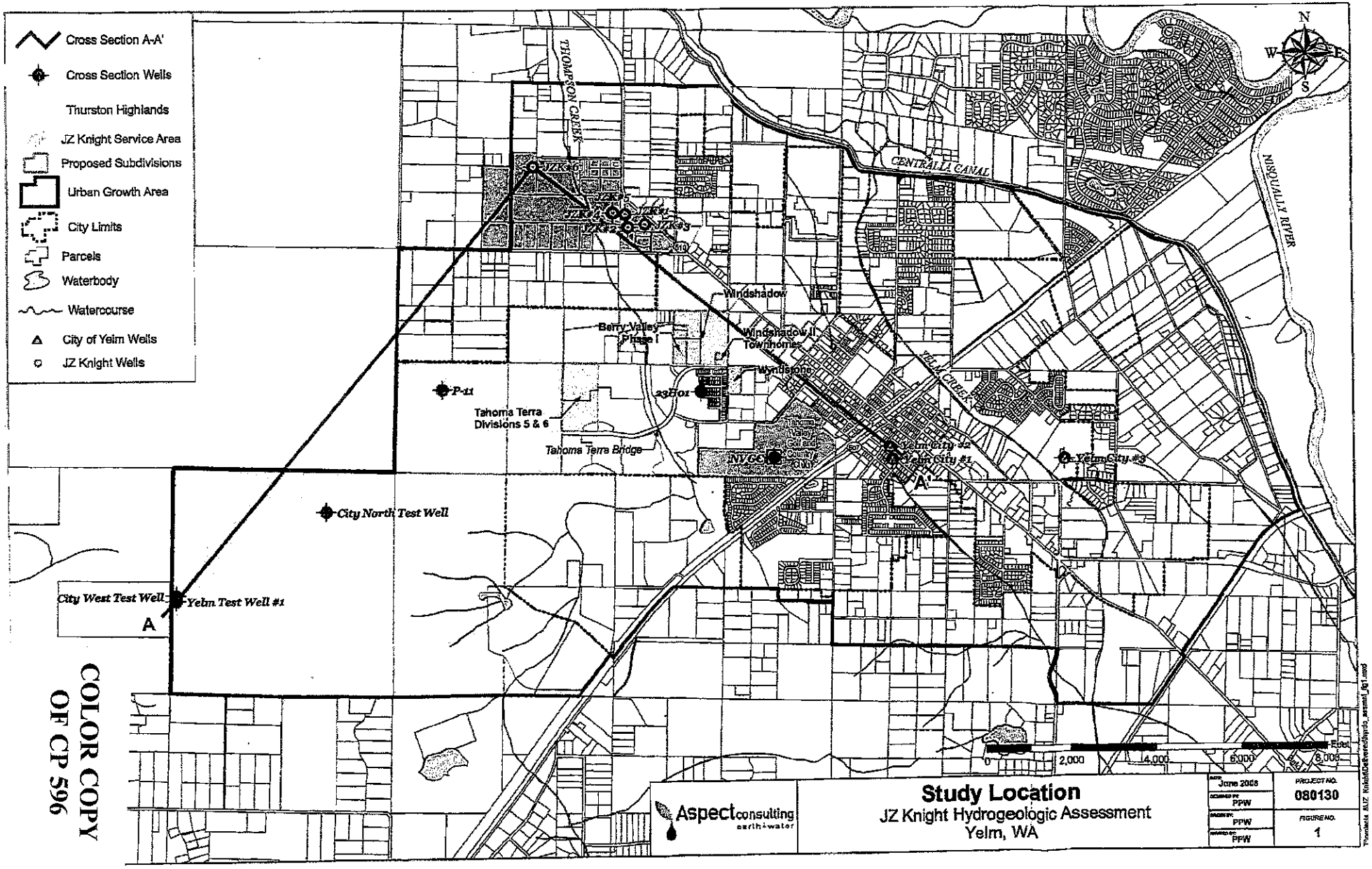

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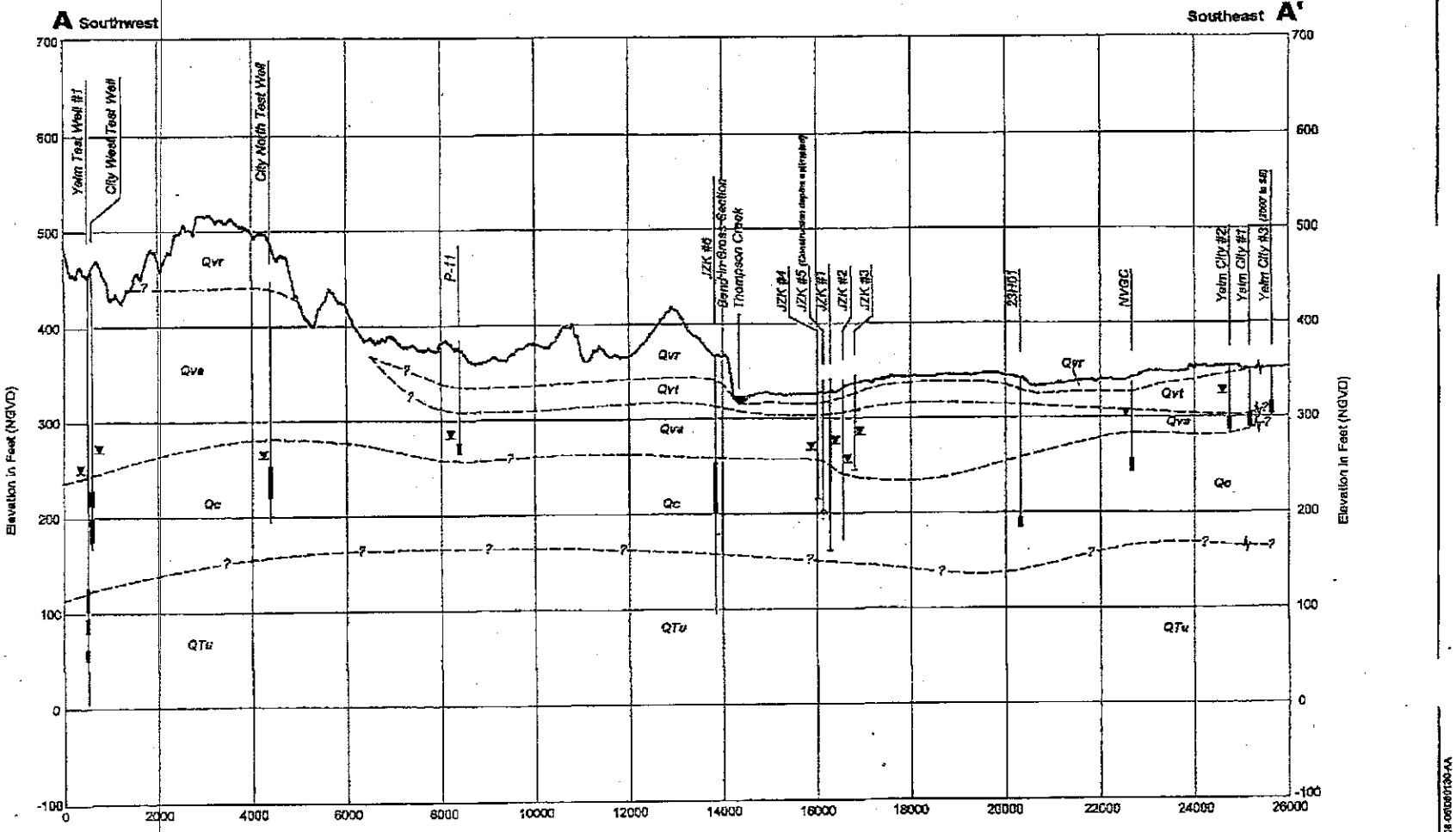


LEGEND

Water level at time of drilling

Cased well

Open portion of well

Qvr	Vashon Recessional Outwash
Qvt	Vashon Glacial Till
Qva	Vashon Advance Outwash
Qc	Salmon Springs Drift
QTu	Unconsolidated, Undifferanciated Deposits

Horizontal Scale

Vertical Exaggeration = 20X
Scale: 1" = 2000' Horiz.
1" = 100' Vert.

Aspect consulting

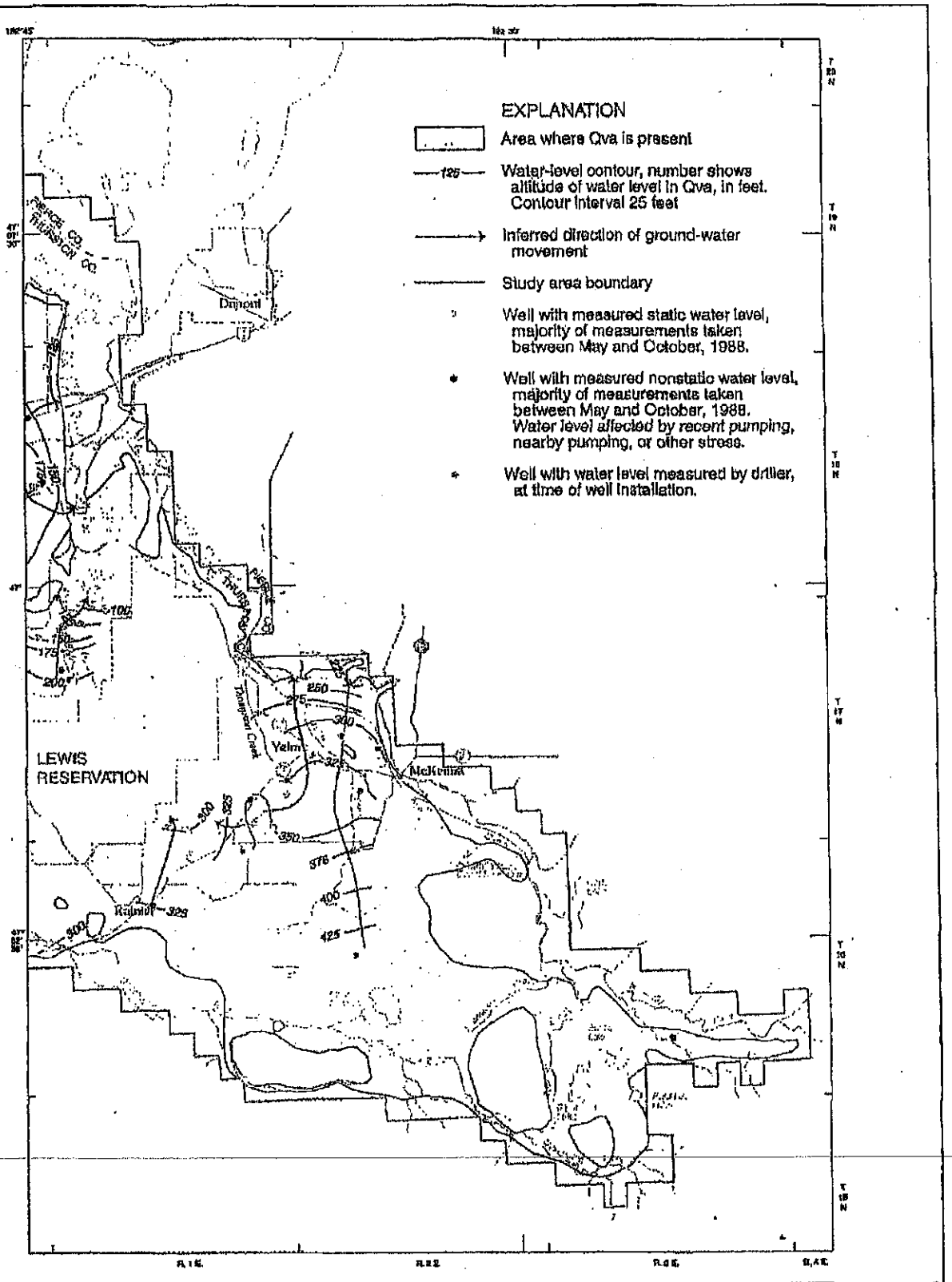
Cross Section A-A'

JZ Knight Hydrogeologic Assessment
Yelm, Washington

PROJECT NO. 080130
FIGURE NO. 2

Q:\JZ Hydrologic Assessment\2008\080130-AA

0-0000000597



From USGS WRIR 99-4165

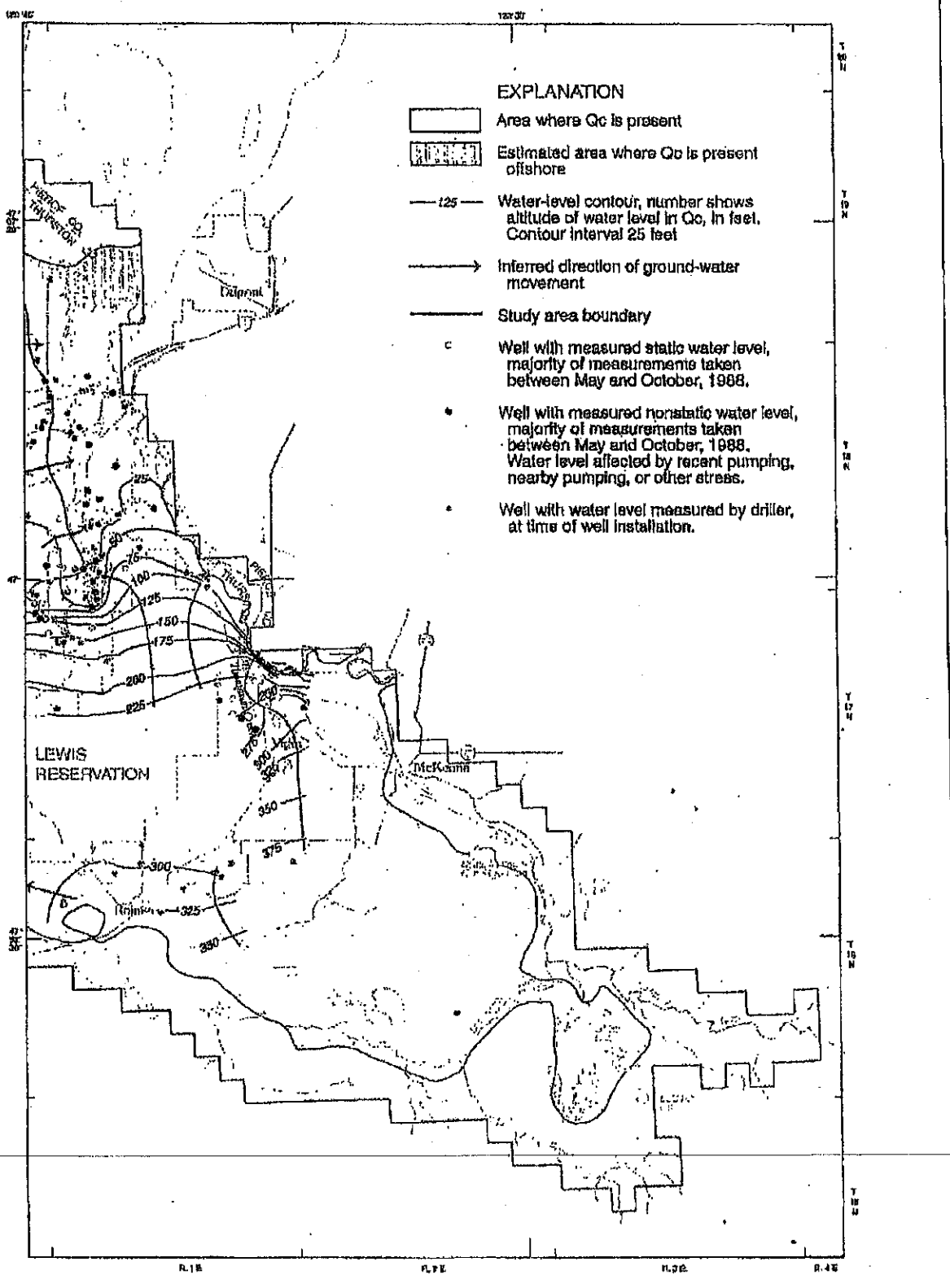
Aspect consulting

Qva Aquifer Groundwater Elevation Contours

JZ Knight Hydrogeologic Assessment - Yelm, WA

DATE	July 2008
DRAWN BY	USGS
CHECKED BY	USGS
APPROVED BY	—
PROJECT NO.	080130
FIGURE NO.	3

0-000000598



From USGS WRIR 99-4165

Aspect consulting earth+water

Qc Aquifer Groundwater Elevation Contours

JZ Knight Hydrogeologic Assessment - Yelm, WA

July 2006	PROJECT NO. 060130
DRAWN BY USGS	
CHECKED BY USGS	FIGURE NO. 4

0-000000599